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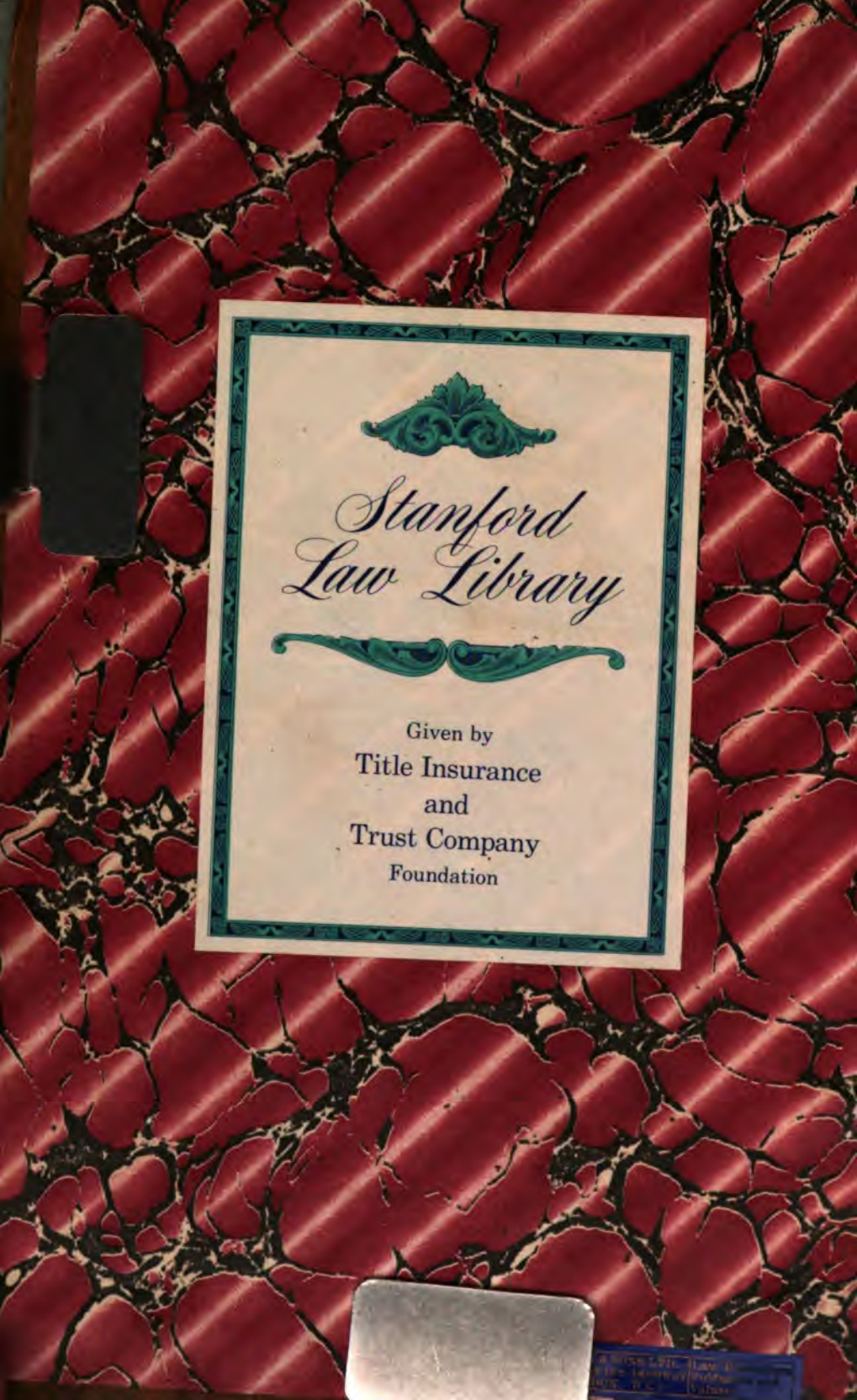
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DIGEST

OF THE

Laws of England

RESPECTING

REAL PROPERTY.

By WILLIAM CRUISE,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

VOLUME THE FIFTH.

CONTAINING

Title 35. FINE.
36. RECOVERY.
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CONTENTS

OF THE

FIFTH VOLUME.

TITLE XXXV.

FINE.

CHAP. I.

Of the Origin and Nature of Fines.

		Page
§ 1.	ORIGIN of Fines	3
6.	Deſcription of	5
9.	Fines taken from the Civil Law	7
12.	When firſt adopted	8

CHAP. II.

Of the Manner of levying Fines.

§ 1.	Antient Manner of levying Fines	10
7.	Modern Manner of levying Fines	13
9.	Original Writ	14
19.	Licentia Concordandi	17
20.	King's Silver	ibid.
29.	Concord	23
46.	Note	30
47.	Foot, or Chirograph	ibid.
52.	All the Proceedings on Fines muſt be recorded	31
54.	No Averment againſt the Chirograph	33

Page
§ 56. Of Motions to prevent Fines from being completed - 36
58. Of the Proclamations - - - 37
68. Felony for one Perſon to acknowledge a Fine in the Name of another - - - 41
69. At what Time a Fine is completed - - ibid.
72. When a Fine begins to operate - - 42

CHAP. III.

Of the ſeveral Sorts of Fines.

§ 1. Fines executed and executory - - - 45
9. Fines ſur Cognizance de Droit, Come ceo, &c. - 48
17. Fines ſur Cognizance de Droit tantum - - 50
21. Fines ſur Conceſſit - - - 52
22. Fines ſur Done, Grant, et Tender - - ibid.

CHAP. IV.

In what Courts Fines may be levied, and before whom acknowledged.

§ 3. Court of Common Pleas - - - 57
7. Of the County Palatine of Lancaſter - - 58
8. Of the County Palatine of Cheſter - - 59
9. Of the County of the City of Cheſter - - 60
10. Of the County Palatine of Durham - - 61
12. Of the Great Seſſions in Wales - - 62
14. Of the Iſle of Ely - - - ibid.
15. Courts of antient Demeſne - - - 63
17. Courts of Cities and corporate Towns - - 65
19. Before whom Fines may be acknowledged - - ibid.
20. Commiſſioners under a Writ of Dedimus Poteſtatem 66
25. Judges of Aſſize - - - 70
27. How the Acknowledgment is to be certified - 71
36. Rules of Court reſpecting the taking of Fines by Dedimus - - - - 74
41. Lord Chief Juſtice of the Common Pleas - - 77
42. Juſtices of Wales - - - ibid.

CHAP. V.

Of the Parties to a Fine.

		Page
§ 1.	Who may levy Fines	74
3.	The King	80
4.	The Queen	ibid.
5.	Married Women	ibid.
13	Coparceners, Joint-Tenants, and Tenants in common	84
14.	Perſons outlawed	85
15.	Who are diſabled from levying Fines	ibid.
16.	Perſons having no Eſtate of Freehold in the Lands	ibid.
25.	An Alien	89
26.	Infants	90
30.	Infant Truſtees may levy Fines	93
33.	Idiots and Lunatics	94
37.	Corporations	97
38.	Women ſeiſed of Jointures	ibid.
39.	Eccleſiaſtics ſeiſed Jure Eccleſiæ	ibid.
40.	What Perſons may take Lands by Fine	ibid.

CHAP. VI.

Of what Things a Fine may be levied.

§ 1.	Every Species of real Property	99
7.	Tithes	100
8.	New River Shares	101
10.	By what Deſcriptions	102

CHAP. VII.

In what Caſes Fines may be amended.

§ 2.	Original Writ	109
5.	Entry of the King's Silver	111
6.	Proclamations	112
9.	Deſcriptions of the Lands	113
16.	A Fine, recorded of one Term, will not be altered to another	116
17.	No change of Chriſtian Name allowed	117
18.	A Fine cannot be amended after Exemplification	118

CHAP. VIII.

Page

Of the Force and Effect of a Fine at Common Law, and by the Statutes of 18 *Edw.* 1., 27 *Edw.* 1., *and* 34 *Edw.* 3.

§ 1. Force of a Fine at Common Law - - 119
7. Of the Statute de Modo Levandi Fines - - 123
11. Of the Statute de Finibus Levatis - - 125
13. Of the Statute of Non-Claim - - 126

CHAP. IX.

Of the Force and Effect of Fines by the Statutes 1 *Rich.* 3., 4 *Hen.* 7., *and* 32 *Hen.* 8., *in barring Eſtates Tail.*

§ 1. Of the Statute 1 Rich. 3. - - - 129
2. Of the Statute 4 Hen. 7. - - - 130
4. Of the Statute 32 Hen. 8. - - - 132
5. Operation of theſe Statutes in barring Eſtates Tail - 133
21. The Tenant in Tail need not be in Poſſeſſion - - 137
31. An Eſtate Tail in a Rent-Charge is barrable - - 143
32. And in an Advowſon - - - 144
33. And in a Truſt Eſtate - - - 145
34. A Fine bars the Iſſue in Tail before Proclamation - ibid.
37. Fines in inferior Courts no bar to Iſſue in Tail - - 147
39. The Right to levy a Fine cannot be reſtrained - - ibid.
40. A Fine does not bar Remainders - - - 148
41. But lets in the Reverſion - - - ibid.
42. Exception in the Statute 32 Hen. 8. - - ibid.
43. Effect of a Warranty in a Fine - - 149

CHAP. X.

Of the Force and Effect of a Fine in barring particular Perſons, Eſtates, and Intereſts.

§ 2. Parties - - - - 150
3. Lay Corporations - - - - 151
4. Married Women - - - - 152
23. Truſt Eſtates - - - - 159
30. Copyholds - - - - 162
33. Terms for Years - - - 163
41. Eſtates held by Statute Merchant, &c. - - 166

Page
§ 44. Deviſees - - - - 167
45. Executors, to whom Lands are given for Payment of Debts - - - - ibid.
51. A Power appendant, or in groſs - - 163
54. But not a Power collateral to the Lands - - 170
56. Writ of Error - - - 173

CHAP. XI.

Of the different Savings in the Statute 4 Hen. 7., and the Exceptions in favour of Infancy, Coverture, &c.

§ 1. Of the firſt Saving - - - 174
3. Of the ſecond Saving - - - 175
17. Of Perſons having different Rights - - 180
29. Of the Exceptions in favour of Infancy - - 189
40. Caſe of Perſons dying under their Diſabilities - - 195

CHAP. XII.

Of ſome other Effects of a Fine.

§ 1. A Fine ſometimes operates as a Releaſe - - 200
4. Sometimes as a Confirmation - - 201
6. A Fine lets in the Reverſion, and makes it liable to prior Incumbrances - - - ibid.
8. Operates an Eſtoppel - - - 202
10. Sometimes creates a Forfeiture - - - 203
19. Operates as a Revocation of a Deviſe - - 205
20. A Fine ſur Done, Grant, et Render, gives a new Eſtate - - - - ibid.

CHAP. XIII.

What Perſons, Eſtates, and Intereſts, are not barred by a Fine.

§ 2. The King - - - - 208
3. Eccleſiaſtical Corporations - - - 209
5. Eſtates not deveſted - - - 210
13. A Rent, Right of Way, and Common - - 212
15. Neceſſity of an adverſe Poſſeſſion - - 217
18. Eſtates Tail, of the Gift of the Crown - - 218
19. Springing and Shifting Uſes - - - 219
22. Dignities - - - - 220

CHAP. XIV.

How Fines may be reverſed and avoided. Page

§ 1. Writ of Error - - - - 221
5. Who may bring a Writ of Error - - 223
25. Writ of falſe Judgment - - - 229
26. Writ of Deceit - - - - ibid.
31. Motion - - - - 231
33. Modes of avoiding the Effects of a Fine - - ibid.
34. Action - - - - 232
38. Entry - - - - 233
57. Plea - - - - 242
60. Averment of Fraud - - - - 243
64. Courts of Equity - - - 244

TITLE XXXVI.

COMMON RECOVERY.

CHAP. I.

Of the Origin and Nature of a Common Recovery.

§ 1. Origin of a Recovery - - - 268
8. Manner in which it is ſuffered - - - 271

CHAP. II.

Of the Writ of Entry.

§ 1. Things requiſite to a Recovery - - - 275
2. Writ of Entry - - - ibid.

CHAP. III.

Of the Tenant to the Præcipe.

§ 1. Reaſons why the Tenant to the Præcipe ſhould have the Freehold - - - - 279
17. Where there are Leaſes for Lives, they need not be ſurrendered - - - 287
19. But Perſons, having a prior Eſtate for Life, muſt join 289
21. A ſurrender by the Tenant for Life is ſometimes preſumed - - - - 290

29. Different

Page

§ 29. Different Conveyances, by which a Tenant to the Præcipe may be made - - - - 302
32. Fine - - - - - - 3
35. Although no Uſe be declared - - 303
37. Huſband, ſeiſed Jure Uxoris, may make a Tenant to the Præcipe, without his Wife joining in a Fine 305
40. Feoffment - - - - - - 307
42. Bargain and Sale inrolled - - - 332
45. Leaſe and Releaſe - - - - - ibid.
46. A Recovery may, in ſome Caſes, be good, without a Tenant to the Præcipe - - - 333

CHAP. IV.

Of Voucher.

§ 1. Nature of - - - - - 338
4. Of vouching in Perſon, or by Attorney - - 339
12. Rules of Court, reſpecting Warrants of Attorney - 342
15. Of the Writ of Summoneas ad Warrantizandum - 346

CHAP. V.

Of Judgment.

§ 1. Nature of - - - - - 351
5. Relation of Judgments to the Firſt or other Day of the Term - - - - 352
15. Judgment cannot be given on a Sunday - - 364

CHAP. VI.

Of Execution.

§ 1. Nature of - - - - - 371
6. May be ſued againſt the Heir - - 372
9. Muſt appear upon Record - - - 373
11. All the Proceedings in Recoveries may be inrolled - 376
13. Statute 14 G. 2. c. 20. ſ. 4. - - - ibid.

CHAP. VII.

In what Courts, and of what Things, a Recovery may be ſuffered.

§ 1. Court of Commons Pleas - - - 379
2. Courts of Great Seſſion in Wales - - ibid.

Page

§ 3. Courts of Chester - - - 379
4. Courts of the Counties Palatine of Lancaster and Durham - - - - 380
5. Court of Huſtings in London - - - ibid.
6. Of what Things a Recovery may be ſuffered - ibid.
8. Tithes - - - - 381
9. Advowſons - - - - ibid.
12. Rents, &c. - - - - 382
13. But not of a Fiſhery, &c. - - - ibid.
14. By what Deſcriptions - - - ibid.

CHAP. VIII.

Of the Parties to a Recovery.

§ 1. Who may ſuffer a Recovery - - - 392
2. Married Women - - - - ibid.
3. Aliens - - - - 393
4. Who are diſabled from ſuffering Recoveries - ibid.
5. The King - - - - ibid.
6. Infants - - - - - ibid.
17. Idiots, Lunatics, &c. - - - 397
19. Tenants for Life - - - - 398
22. Women ſeiſed of Dower or Jointures - - 399
48. Huſband, ſeiſed Jure Uxoris - - - 409
55. Eccleſiaſtics, ſeiſed Jure Eccleſiæ - - 410

CHAP. IX.

Of the Amendment of Recoveries.

§ 2. Writ of Entry - - - - 411
3. Names of the Parties - - - 412
9. Deſcription of the Eſtates - - - 413
18. Exceptions - - - - 416
24. There muſt be ſomething to amend by - - 418

CHAP. X.

Of the Operation of a Recovery in barring Eſtates Tail, Remainders, and Reverſions.

§ 1. Ancient Modes of barring Eſtates Tail - - 420

Page

§ 12. A Recovery is a good bar to an Eſtate Tail - 427
23. Of Joint Vouchers - - - - 431
35. An Intail of a Rent barred by a Recovery - 440
38. Of Recoveries with ſingle and double Voucher - 441
55. Effect of Recoveries in barring Remainders and Reverſions - - - - 451
61. The Power of ſuffering a Recovery cannot be reſtrained - - - - 453

CHAP. XI.

Of the Force and Effect of a Recovery in barring other Eſtates and Intereſts.

§ 2. Dower, &c. - - - - 458
7. Truſt Eſtates - - - - 459
12. What Poſſeſſion neceſſary - - - 461
18. Powers appendant, or in groſs - - 466
22. Conditions collateral - - - 468
28. Contingent Remainders - - - 471
31. Writ of Error - - - - 472

CHAP. XII.

Of ſome other Effects of a Recovery.

§ 1. Operates as a Forfeiture of an Eſtate for Life - 474
4. Eſtoppel - - - - 476
5. In ſome Caſes alters the Deſcent - - ibid.
9. Revokes a Deviſe - - - 484
10. Lets in prior Incumbrances - - - ibid.

CHAP. XIII.

What Perſons, Eſtates, and Intereſts, are not barred by a Recovery.

§ 1. Perſons, who are not Parties - - - 488
2. Eſtates precedent to that, of which the Recovery is ſuffered - - - - 489
6. An Executory Deviſe - - - 490
8. Eſtates Tail, granted by the Crown as a Reward for Services - - - - ibid.
20. Reverſions veſted in the Crown - - - 502
23. Tenants by Elegit - - - - 503
24. Eſtates held in Dower, &c. - - - ibid.

CHAP.

CHAP. XIV.

How Recoveries may be reverſed or falſified. Page

§ 1. Writ of Error - - - - 504
4. Who may bring this Writ - - - ibid.
10. No Averment againſt the Record - - 507
15. The parol demurs for Infancy - - - 508
20. A Releaſe of Errors from the common Vouchee not good - - - - - 510
22. Writs of Error muſt be brought within Twenty Years ibid.
25. Of falſifying a Recovery - - - 512
30. A Tenant for Years may falſify - - 514
33. Courts of Equity - - - ibid.

TITLE XXXVII.

ALIENATION BY CUSTOM.

CHAP. I.

Alienation of Copyholds by Surrender and Admittance.

§ 1. Alienation by Cuſtom - - - 533
4. Surrender - - - - 534
17. Who may ſurrender - - - 537
25. To whoſe Uſe a Surrender may be made - - 539
29. Preſentment - - - - 540
33. Admittance - - - - 541
37. The Admittance muſt be according to the Surrender 543
40. Who may admit - - - - 544
41. Effect of a Surrender and Admittance - - ibid.
43. The Admittance relates back to the Surrender - 545
47. Surrenders by way of Mortgage - - 552
55. A Surrender will not deſtroy a contingent Remainder 554
58. Conſtruction of Surrenders - - - 555
77. A Surrender is ſometimes ſupplied in Equity - 566

CHAP. II. Page

How Intails of Copyholds may be barred, and the Effect of Releaſes.

§ 2. Forfeiture and Regrant - - - 568
7. Recovery in a Manor Court - - - 571
13. How ſuch Recoveries may be reverſed - - 573
18. Surrender - - - - 577
24. A Cuſtom to bar by Surrender, or Recovery, is good 579
26. A Grant of the Freehold deſtroys the Intail - 582
30. How conditional Fees are barred - - 585
32. Effect of Releaſes - - - ibid.

INDEX TO CASES

IN THE

FIFTH VOLUME.

A — Page

ABBOT v. Burton - 484
Acton v. Baldwin - 417
Addison v. Dawson - 248
——— v. Otway - 384. 391
Ailet v. Walker - - 394
Aland v. Malone - - 508
Alban (Sir John)'s Case - 396
Allen v. Palmer - 559. 564
—— v. Sayer - - 249
Altham (Ld.) v. Anglesey (Ld.) 304
Anonymous 19. 72. 155. 158. 230. 237. 278. 282. 401. 566.
Archer's Case - - 140
Argenton v. Westover - 70
Arundel v. Arundel - 73. 227

B

Bacon (Sir N.)'s Case 342. 354
Baker v. Johnson - - 384
Ball v. Cock - - 19
Barber v. Nunn - ib.
Barker v. Hill - - 266
——— v. Keate - 332
Barnard v. Woodcock - 348
Bartholomew v. Belfield - 173
Barton v. Lever and Brownlow 228. 428. 473
Barton's Case - - 277

Page

Basket v. Peirce - - 162
Bath (Ld.)'s Case - - 463
Bayley v. Oxford (University of) 381
Beaumont's Case - 134. 409
Bedford (E. of) v. Forster - 72
Benson v. Scott - - 549
Berkley (Ld.)'s Case - 136
Berrington v. Parkhurst - 238
Bettison v. Farringdon - 456
Beverley's Case - - 197
Beverley v. Beverley - 460
Blany v. Mahon - - 107
Blenkarne v. Jennens - 566
Blount v. Clarke - - 549
Blount's Case - - 395
Blundell v. Baugh - - 325
Bohoun v. Burton - - 115
Bohun's Case - - 111
Bovey v. Smith - - 248
Bradstock v. Scovell - - 143
Brazier's Case - - 232
Bredon's Case - - 204
Bridges v. Chandos (D. of) 292
Brind v. Brind - - 158
Brome (Sir J.)'s Case - 31
Brooke v. Biddolph - 413
Brown v. Foster - - 555
—— (Sir G.)'s Case - 407
——'s Case - - 571

Bruyn

	Page
Bruyn (Sir J.)'s Case	104
Brydges v. Brydges	461
Bunting v. Lepingwell	555
Burnaby v Griffin	462
Bushley's Case	94

C

Cann v. Cann	584
Cannon v. Pack	554
Capel's Case	451
Carr v Singer	579
Carter v. Barnardiston 86. 286.	472
Challoner v. Murhall	584
Champernoon v. Godolphin	223
Chaplin v Chaplin	440
Chapman v. Bacon	412
Cheney v. Hall	486
Chesterfield's Case	496
Cholmley's Case 451.	503
Church v. Wiat	572
Clifford v. Ashley	159
Clithero v. Franklin	439
Clun's Case	572
Cockman v. Farrer	228
Coleby v. Smith	246
Collins v. Plummer	456
Combe's Case	536
Compton v. Collinson	538
Copland v. Platt	402
Corbet v. Stone 165.	212
Corbet's Case	453
Cottingham v. King	389
Cotton v. Baylie	29
—— v. Tyrrell	20
Cotton's Case	197
Cousin's Case	93
Craghill v. Pattison	115
Croft v. Howell	151
Cromwell's Case	168
Cross and Grey	411
Cuppeldike's Case 446. 449.	450

D

Damport v. Wright	179
Darcy v. Jackson	356
Day v. Hungate	245
Dean v. Tidmarsh	74
Deighton v. Grenville 167.	184
Derby (Ld.)'s Case	375
Digges's Case 169. 171,	172
Dillon v. Leman	198
Dixon v. Lawson	117

	Page
Doe v. Hellier	204
—— v Holm	472
—— v. Jones	192
—— v. Morgan	552
—— v. Mulgrave (Ld.)	473
—— v. Truby	582
—— v. Whitehead 171.	235
—— v. Williams	86
—— v. Wroot	552
Done v. Smethier and Leigh	15
Dormer's Case 277.	390
Dormer v. Parkhurst 284.	513
Dowling's Case	112
Down's Case	ib.
Downes v. Savage	71
Dowse v Reeve	415
Draper's Company v. Yardley	248
Driver v. Edgar	469
—— v. Lawrence	150
Dunn v. Green	582
Duroure (Doe ex dem.) v. Jones	192

E

Eare v. Snow 421. 435.	437
Edwards v. Rogers	89
—— v. Slater	212
Elliot's Case	79
Erish v. Rives	537
Erasfield's Case	29
Eustace v. Scawen	200
Everall v. Smalley	579
Eyston v. Studd	403
Eyton v. Eyton	107

F

Farmer's Case 18.	25
Faveley v. Easton	105
Fawcett v. Lowther	552
Fazakerly v. Baldo	228
Fermor's Case	182
Ferrers v. Fermor	303
Ferres v. Ferres	515
Finch's Case	103
Fines, Case of 139.	146
Fish v. Brockett	39
Fisher v. Wigg	556
Fitzhugh's Case	232
Fitzwilliam's Case	447
Fleetwood v. Calendar	76
Focus v. Salisbury	165
Ford v. Grey (Ld.)	217

	Page
Forſel v. Welſh	541
Forſter v. Pollington	114
Foſter v. Pitfal	403
Freeman v. Barnes	166
Freſhwater v. Rois	443
Frogmorton v Wharrey	564
Froud v. Green	293

G

Gage's Caſe	109
Garrett v. Blizard	293
Gartſide v. Radcliffe	301
Gibbons v. Stephenſon	350
Goburn v. Wright	73
Goddard v. Complin	485
Godfrey v. Wade	142
Goodrick v. Brown	250
——— v Shotbolt	159
Goodright v. Billington	472
——— v Board and Jones	214
——— v. Dunham	472
——— v. Mead and Shilſon	486
——— v. Rigby	335
Goodtitle (ex. dem. Bridges v. Chandos (Dſs of)	292. 513
Goodtitle v. Moyſe	538
Grant's Caſe	141
Grantham v. Copley	570
Green v. Froud	290
Gregory v. Croucher	21
Greneley's Caſe	408
Griffin v. Ferrers	79
——— v. Stanhope	283
Griffith (Sarah)'s Caſe	92

H

Hall v. Woodcock	509
Hallet v. Saunders	447
Hanmer v. Eyton	164
Hare (Goodright ex. dem.) v. Board and Jones	214
Harrington v. Smith	405
Hart's Caſe	227
Heath v. Wilmot (Sir J. E.)	116
Heathcock v. Hanbury	76
Heliot v. Saunders	144
Henningham v. Windham	505
Henzell v. Lodge	411. 414
Herbert v. Binion	73. 225. 428
Herring v. Brown	170
Heſket v. Lee	395
Hill v. Upchurch	578
Holbeach v. Sambeach	201
Holdfaſt v. Clapham	551
Holland v Dancy	356
Holt v. Lowe	251
Hopton v. Johns	394
Howlet v. Carpenter	210
Hubert's Caſe	243
Hudſon v. Benſon	424. 452
Hughes v. Clubbe	404
Hull v. Sharbrook	587
Hulm v. Heylock	167
Hume v. Burton	518
Hungate's Caſe	92
Hunt v. Bourne	63. 317
——— v. King	137. 139
Hutchinſon's Caſe	92. 231
Hynde's Caſe	332

I

Idle v. Cook	556
Incledon v. Northcote	459
Iſcham v. Morrice	163

J

Jenkinſon v. Staples	413
Jennings v. Moore	566
Jennings's Caſe	329. 431
Johnſon and Bellamy's Caſe	141
——— v. Derby (E. of)	497
——— ex parte	397
Jones v. Cave	513
Jourden v. Denny	358

K

Keckwith's Caſe	92
Keen v. Effingham (E. of)	296
——— v. Kirby	572
Keys v. Bull	79
King (the) v. Pigott	393
King v. Burchell	456
——— v. Melling	467
Kingſton v. Herbert	509
Kingſton (Ducheſs of)'s Caſe	524
Kirkman v. Thompſon	402, 406
Kite and Queinton's Caſe	586
Kynaſton v. Clark	202

L

Lacey v. Williams	280
Lampet's Caſe	156

	Page
Lane v. Pannel	563
Langhter v. Humphrey	401
Laund v. Tucker	181
Lee v. Brown	577
Leech v. Cole	432
Lever v. Hofier	384
Lewing's Cafe	95
Lincoln College Cafe, 283. 406.	443
Lindfay v. Grey	111
Lifter v. Lifter	96
Lloyd v. Carew	219
—— v. Evelyn	302
—— v. Say and Sele (Vifcount)	34, 333
—— v. Vaughan	511
Loddington v. Kyme	472
Loggin v. Pullen	415
Lombe v. Lombe	93
Lord v. Bifcoe	412
Lovell v. Lovell	557
Lumbard's Cafe	421
Lynch v. Spencer	407

M

Machill v. Clerk	470
Mackwilliam's Cafe	142
Mackworth (Sir H.)'s Cafe	395
Magdalene College (Cafe of)	209
Maire, ex parte	93
Mallet v. Mallet	103
Martin v. Mowlin	575
—— v. Strahan	476
Maffey v. Rice	385
Mathefon v. Trot	324
Mayo v. Combes	83
Mayre v. Coulthard	412
Menville's Cafe	179
Meredith v. Leflie - 444.	476
Merton (Abbot of)'s Cafe 11,	12
Metcalfe ex dem. Parry and others	325
Milbank v. Joliffe	414
Mildmay v. Hungerford	554
Mildmay's Cafe	453
Mitchell v. Neave	536
Monk v. Butler	106
Moody v. Moody	448
Moore's Cafe	549
Moreau's Cafe	84
Motley, ex parte	117
Murrell and Oſborn	436
Murrey v. Egton and Price	496

N

Nayler v. Baldurn	158
Neale v. Wilding	502
Norfolk (D. of)'s Cafe 164.	220
Norrice (Ld.) v. Winchefter (M. of)	510
North v. Champernoon	459

O

Odiarne (Doe ex dem.) v. Whitehead - 171.	235
Ognell v. Arlington (Ld.)	166
Oldcot v. Level	572
Oliver v. Taylor	577
Owen v. Morgan	438

P

Page v. Hayward - 433.	468
Parker v. Kett	536
Parrot (Herbert)'s Cafe	92
Patteſon v. Thompſon	506
Paulin v. Hardy	283
Pearſon v. Pearſon	416
Peck v. Channel	443
Pelham's Cafe	474
Pembroke (Ld.) v. Jeffries (Ld.)	110
Pembroke (Ld.)'s Cafe 411,	508
Penne v. Peacock	81
Penyſton v. Lyſter	176
Perkins v. Sewell	498
Pettus v. Godſalve	113
Petty's Cafe - 42,	74
Pigot v. Palmer	400
Pigott v. Saliſbury	204
Piggot v. Harrington	224
—— v. Waller	466
Pilkington v. Stanhope	569
Pincke v. Thornycroft	256
Pledgard v. Lake	489
Plunkett v. Holmes	472
Pollard v. Luttrell	240
Porter v. Porter	546
Portington (Mary)'s Cafe 426.	524
Portſmouth (E. of) v. Effingham (E. of)	296
Powell v. Beach	115
Powell's Cafe	243
Poyntz's Cafe	93
Pride v. Langford	206
Prodger (Margaret)'s Cafe	162
Purſlow's Cafe	146

	Page
R	
Raby v. Robinſon	394
Ragg and Bowley's Caſe	40
Ratcliffe's Caſe	425
Rawlinſon v. Green	542
Read and Morpeth v. Errington	317
Reaſon v. Sacheverell	155
Requiſhe v. Requiſhe	93
Rex v. Firebrace	573
—— v. Mead	229
Roberts v. Kingley	562
Robinſon v. Cumming	460
—— v. Cummins	305, 306
Roe v. Aiſtrop	561
—— v. Baldwin	484
—— v. Griffith	565
Ruſhley v. Mansfield	247
Rutland (E. of)'s Caſe	137
S	
St. John v. Turner	245
Saffin's Caſe	163. 212
Saliſbury v Aſhley	159
Salvin v. Clerk	183
—— v. Thornton	460
Sambourn v. Belke	282
Saville v. Blackett	467
Say v. Smith	75. 77
Seagood v. Hone	556
Selwin v. Selwin	353
Seton v. Sinclair	77
Seymour's Caſe	201. 234
Shapland v Smith	461
Sharington v. Strotton	401
Sheepſhanks v. Lucas	364. 505
Shelburne v. Biddulph	201
Shelly's Caſe	353. 361. 372. 428
Sherlock's Caſe	93
Simmons's Caſe	450
Simpſon v. Turner	406
Skinner v. Laud	413
Smith v. Abel	203
—— v. Barnaby	440
—— v. Clifford	475
—— v. Dean and Chapter of St. Paul's	574
—— v. Stapleton	136. 145
Solly v. Whitfield	158
Standford's Caſe	180
Stanhope v. Thacker	515
Stanton v. Barney	585
Stephens v. Tyrrell	537
Stokes v. Oliver	394. 508.
Stork v. Fox	104
Stowell v. Zouch	188. 191. 193. 194. 211.
Stratfield v. Dover	494
Strilley's Caſe	113
Stud and Courtney's Caſe	107
Suffolk (E. of) v. Howard	456
Sunie v. Howes	196
Sutton v. Stone	559
Swanne v. Broom	364
Symonds v. Cudmore	201
T	
Taltarum's Caſe	328. 422. 426. 442
Taylor v. Horde	308. 513
—— v Wheeler	553. 566
Tey's Caſe	54
Thinne v. Thinne	382
Thomaſin v. Mackworth	168
Thruſtout v. Cunningham	565
Thurban v. Pantry	412
Townſend (Ld.) v. Aſh	86
Tregare v. Geanys	114
Trevor v. Trevor	250
Turner v. Turner	382
V	
Vane v. Fletcher	566
Vaughan v. Atkins	546
Vick v. Edwards	202
Villars v. Beaumont	402
W	
Waddy v. Newton	104
Wade's Caſe	552
Wakefield v. Hodgſon	39
Waldron v. Roſcarriot	105
Walker v. Okenden	114
Ward v Walthew	404
Waring v. Whale	65
Warren (ex. dem. Webb) v. Greville	291. 293
Warſcombe v. Carrell	92
Waſe v. Petty	588
Watſon v. Cox	414
—— v. Lockley	418
Watts v. Birkett	231
Weale v. Lower	202
Weeks v. Peach	440

	Page
Welby v. Welby -	245
Weldon v. Ebor' (Duc.)	250
Wentworth (Sir B.)'s Caſe 398. 513	
Wermedale (Roger de)'s Caſe	121
Weyland's Caſe -	124
Whaley v. Tancred -	183
Wheeler v. Heſeltine -	416
White v. Thornburg -	578
Whitwell v. Maſters	413
Whyte v. Weſt -	471
Willis v. Shorrall -	172
Wilton and Fairfax -	418
Winchester (M. of)'s Caſe	283. 437. 506
Wiſeman v. Crow -	399
Wiſeman's Caſe -	503
Witham v. Lewis -	373
Woodhouſe v. Brayfield	246
Worſley (ex parte) -	345
Wotton v. Hale -	155
Wright v. Booth -	245
——— v. Kemp -	557
——— and Wickham (M. of)	16
——— (Mayor of) - -	226
Wynne v. Lloyd -	346. 356
——— v. Wynne 342. 355. 418.	507

Z

Zouch v. Bamfield -	138
——— v. Thompſon -	230

A

DIGEST

OF THE

Laws of England

RESPECTING

REAL PROPERTY.

TITLE XXXV.

FINE.

CHAP. I.

Of the Origin and Nature of Fines.

CHAP. II.

Of the Manner of levying Fines.

CHAP. III.

Of the several Sorts of Fines.

CHAP. IV.

In what Courts Fines may be levied, and before whom acknowledged.

CHAP. V.

Of the Parties to a Fine.

CHAP. VI.

Of what Things a Fine may be levied.

CHAP. VII.

In what Caſes Fines may be amended.

CHAP. VIII.

Of the Force and Effect of a Fine at common Law, and by the Statute of 18 *Edw.* 1. 27 *Edw.* 1. *and* 34 *Edw.* 3.

CHAP. IX.

Of the Force and Effect of Fines by the Statute 1 *Rich.* 3. 4 *Hen.* 7. *and* 32 *Hen.* 8. *in barring Eſtates Tail.*

CHAP. X.

Of the Force and Effect of a Fine in barring particular Perſons, Eſtates, and Intereſts.

CHAP. XI.

Of the different Savings in the Statute 4 *Hen.* 7. *and the Exceptions in favour of Infancy, Coverture, &c.*

CHAP. XII.

Of ſome other Effects of a Fine.

CHAP. XIII.

What Perſons, Eſtates, and Intereſts, are not barred by a Fine.

CHAP. XIV.

How Fines may be reverſed and avoided.

CHAP.

CHAP. I.

Of the Origin and Nature of Fines.

§ 1. *Origin of Fines.*
6. *Deſcription of.*
§ 9. *Fines taken from the civil Law.*
12. *When firſt adopted.*

Section 1.

Origin of Fines.

WHEN landed property firſt became the ſubject of alienation, it was found neceſſary to adopt ſome authentic mode of transfer, which might ſecure the poſſeſſion, and evince the title of the purchaſer.

By the antient common law, a charter of feoffment was, in general, the only written inſtrument, whereby lands were transferred or conveyed: but, although this aſſurance derived great authenticity, from the number of witneſſes by whom it was uſually atteſted, and the ſolemn and public manner in which livery of ſeiſin was given, yet ſtill it may be ſuppoſed that inconveniencies would frequently ariſe, either from the loſs of the charter itſelf, or from the difficulty of proving it after a lapſe of years; theſe circumſtances, probably, induced men to look out for ſome other ſpecies of aſſurance, which ſhould be more ſolemn, more laſting, and more eaſy to be proved, than a charter of feoffment.

§ 2. Experience muſt ſoon have diſcovered, that no title could be ſo ſecure and notorious as that which had been queſtioned by an adverſe party, and ratified by the determination of a court of juſtice; and the ingenuity of mankind ſoon found out a method of deriving the ſame advantage from a fictitious proceſs.

To effect this purpoſe, the following plan was adopted: a ſuit was commenced concerning the lands in-

tended to be conveyed, and when the writ was ſued out, and the parties appeared in court, a compoſition of the ſuit was entered into, with the conſent of the judges, whereby the lands in queſtion were declared to be the right of one of the contending parties.

§ 3. This agreement being reduced into writing, was inrolled among the records of the court, where it was preſerved by the proper officer, by which means, it was not ſo liable to be loſt * or defaced, as a charter of feoffment, and, being a record, would at all times prove itſelf. It had alſo another advantage, that, being ſubſtituted in the place of the ſentence which would have been given, in caſe the ſuit had not been compounded, it was held to be of the ſame nature, and of equal force with the judgment of a court of juſtice.

Glanvill lib. 2. c. 20. Bract. 256 *a*. & *b*.

§ 4. When this ſpecies of agreement was compleated, a writ iſſued of courſe to the ſheriff of the county in which the lands lay, in the ſame form as if a judgment had been obtained in an adverſary ſuit, directing him to deliver the poſſeſſion to the perſon who thus acquired the lands.

§ 5. The form which was firſt adopted in this ſpecies of aſſurance, has continued ever ſince. To ſhew the tenor thereof, and the difference between it and the charters which were then in uſe, it ſhall be tranſcribed.

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* There is a record of a fine in *Dugdale's Origines Juridiciales*, page 92. dated 28 *Hen.* 2. *anno* 1182, which is expreſsly mentioned to have been levied, becauſe the charter of feoffment, by which the lands had been conveyed, was loſt.

Hæc

Hæc eſt finalis concordia facta in curia domini regis apud Weſtmonaſterium, in vigilia beati Petri apoſtoli, anno regni regis Henrici ſecundi, triceſimo tertio, coram Ranulpho de Glanville, juſticiario domini regis, et coram H. R. W. et T. et aliis fidelibus domini regis qui ibi tunc aderunt, inter priorem et fratres hoſpitalis Hieruſalem et W. T. filium Normanum et Alanum filium ſuum, quem ipſe attornavit in curia domini regis ad lucrandum et perdendum, de tota terra illa et de pertinentiis de qua terra tota placitum fuit inter eos in curia domini regis : ſcilicet quod prædicus W. et Alanus concedunt et teſtantur donationem quam Normanus pater ipſius W. ipſis inde fecit, et illam terram totam quietam clamant de ſe et hæredibus ſuis domus hoſpitalis et prefato priori et fratribus in perpetuum et per liberum ſervitium quatuor denariorum per annum pro omni ſervitio et pro hac conceſſione et teſtificatione et quieta clamantia prefatus prior et fratres hoſpitalis dederunt ipſi Wilhelmo et Alano centum ſolidos ſterlingorum. Glan. lib. 8. c. 2.

§ 6. This ſpecies of aſſurance was called *finis*, or *finalis concordia*, from the words with which it begins, and alſo from its effect, which is to put a final end to all ſuits and contentions.* It may be deſcribed to be an amicable agreement or compoſition of a ſuit, whether real or fictitious, between the demandant and tenant, with the conſent of the judges, and inrolled among Deſcription of.

* *Et nota quod dicitur talis concordia finalis, eo quod finem imponit negotio, adeo ut neuter litigantium ab ea de cetero poterit recedere. Glan. lib.* 8. *c.* 3 *Finis eſt extremitas unius cujuſque rei, et ideo dicitur finalis concordia quia imponit finem litibus. Bract.* 435.

the records of the court, where the ſuit is commenced, by which lands and tenements are transferred from one perſon to another, or any other ſettlement is made relating to lands and tenements.*

§ 7. To this mode of transferring eſtates of freehold, at common law, the ceremony of livery of ſeiſin is unneceſſary, not becauſe the ſuppoſition and acknowledgement thereof in a court of record induces an equal notoriety, for in ancient fines no ſuch acknowledgement is made; but becauſe lands acquired in this manner were ſuppoſed to be recovered by ſentence of a court of juſtice, and the poſſeſſion was delivered by the ſheriff, in purſuance of a writ directed to him for that purpoſe, which was equal in point of notoriety to the ceremony of livery.

Ante f. 4.

§ 8. A fine was from its firſt inſtitution more highly favoured and protected by the law, than any other kind of aſſurance; for if either of the parties refuſed to adhere to it, there was a particular writ by which

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* *Finis primo dicitur ritus ille ſolennis transferendorum prædiorum in curia regis civilium cauſarum quo nihil ſanctius habetur vel auguſtius ad alienationes et hereditates ſtabiliendas.—Tranſactionis coram rege duo erant genera, unum ſimplici ejus charta enunciatum et teſtatum, aliud tanquam e compoſita lite proveniens rei judicati formam exhibet ideoque finis dictum quaſi litis terminus. Sed genus alterum (qui finis dicitur et finalis concordia) magis placuit quod præter teſtionis magnificentiam, non ſolum ad ſtabiliendas tranſactiones ſed ad reſcindendas lites maxime valet, ideoque ab emptoribus terrarum tanquam ſacra anchora culta et admirata.* Spelman's Gloſs, voce *Finis.*

they

they were compelled to appear, called *querela de fine facto in curia domina regis.* And if the fine was proved to have been duly levied, then the party who refuſed to adhere to it, was attached, till he found ſufficient ſecurity for his compliance.*

Glanv. lib. 1. c. 3. lib. 8. c. 3, 4, 5.

§ 9. The idea of a fine appears to have been originally taken from the *Tranſactio* of the Civilians, which was an accommodation of a ſuit already commenced, or an agreement reſpecting ſome doubtful matter, that would otherwiſe become the ſubject of a ſuit. *Tranſactio eſt ſuper re dubia, aut lite incerta, conventio non gratuita, aliquo dato, retento, vel promiſſo.*

Fines taken from the Civil Law.

Voet, Comp. Jur. 51.

§ 10. Although no modern writer on the *Engliſh* law has taken notice of this circumſtance, yet the definition of a fine, given by *Bracton*, ſeems to be an undoubted proof of it. *Concordia in foro ſeculari idem eſt quod Tranſactio, et eſt Tranſactio de Re dubia et lite incerta, aliquo dato, vel promiſſo, vel retento, alite Tranſactia.* From the ſimilarity of theſe definitions, it appears clearly that the *Engliſh* lawyer copied from the *Roman*; nor ſhould it appear extraordinary that we are indebted to the civil law for this moſt uſeful ſpecies of

Bract. 310. *a* & *b.*

* In ſome caſes, however, the civil authority was inſufficient for this purpoſe. Thus, Mr. *Maddox* has tranſcribed a record, by which it appears that *Julian de Swadefield*, fined to King *John* in two marks and ſix palfrays, *per ſic quod finis factus per cyrographum et per finem duelli, inter ipſum, et Wilhelmum de Curton, de feudo unius militis et dimidii cum pertin' in Ellingeham coram juſticiariis teneatur.*

assurance, when we consider how much our first writers, *Glanville* and *Bracton*, have borrowed from *Justinian*'s Code, although some of the more modern authors appear, either to have been ignorant of the obligations we owe to the *Romans* in this respect, or to have, from a mistaken pride, been extremely unwilling to acknowledge them. Lord *Coke*, however, seems not to have been ignorant of the origin of fines; for, speaking of their etymology, he says,—"And the Civilians call this Judicial Concord, *Transactionem Judicialem de re immobili.*"

Vide Glanv. Prol. & lib. 7. c. 1. Selden ad Fletam.

1 Inst. 262 *a.*

§ 11. The word *finis* appears to have been used as synonymous to *transactio* in the twelfth century; of which several charters published by *Muratori* afford a proof. A part of one of them shall be transcribed. *Transactio inter Gerardum Comitem, &c. atque Attonum Archiepiscopum Pisanum, anno* 1121.—*In Eterni Dei Nomine, Amen. Breve Recordationis qualiter Guardus Comes, &c. Finem fecit et Transactionem Gratiano Vicedomino ad partem Ecclesiæ Archieopiscopatus Sancte Marie et Vice Attoni ejusdem Ecclesie Archiepiscopo, &c. de quinque Partibus integris de Curte de Bellora, &c.*

Antiq. Med. Æv. Tom. 9 pa. 449. Id. 463. 487.

When first adopted.

§ 12. It has been a favourite topic with our lawyers to enlarge very much on the antiquity of fines: some have carried this idea so far as to insist, that they were coeval with the first rudiments of the law, and formed an original assurance; others have contended that fines were well known in this kingdom before

Coke Read. 1. Plowd. 368.

before the *Norman* conqueſt.* But if it be admitted that the firſt idea was derived from the civil law, and we truſt this fact has been fully proved; it will follow that fines could not poſſibly have been known in *England* until ſome time after the year 1130, when a copy of the *Pandects* was found at *Amalphi* in *Italy*; in conſequence of which diſcovery, the ſtudy of the *Roman* law ſpread with uncommon rapidity over all *Europe*, not excepting this iſland, in which *Roger* ſirnamed *Vacarius*, who was brought over by *Theobald* a *Norman* abbot, elected to the ſee of *Canterbury* in the year 1147, read public lectures at *Oxford* on the *Roman* law.

Selden ad Fletam, c. 7. f. 3.

§. 13. As a farther proof of this aſſertion, it may be obſerved that *Dugdale* and *Madox*, the two moſt diligent and learned enquirers into our ancient records and charters, have acknowledged, that they could not diſcover any traces of fines in this country before the reign of *Hen.* 2. who aſcended the throne in 1155, that is, thirty-four years after the introduction of the *Roman* juriſprudence; ſo that there can ſcarce remain a doubt but that fines were firſt adopted in *England* during the reign of *Stephen*, or his immediate ſucceſſor, *Hen.* 2. And that we are indebted to *Juſtinian*'s Code for this part of our law.

Orig. Jur. 92. Formul. Anglic Differt. f. 15.

* It was not unuſual in the *Anglo Saxon* times, for perſons to execute their contracts in the county court, where they were witneſſed, of which *Hickes* in his *Diſſertatio Epiſtolaris*, p. 29, 30. publiſhed in the *Theſaurus Linguarum Septentrionalium*, has produced two inſtances, but they bear no ſort of reſemblance to fines.

TITLE

TITLE XXXV.

FINE.

CHAP. II.

Of the Manner of levying Fines.

§ 1. *Antient Manner of levying Fines.*
7. *Modern Manner.*
9. *Original Writ.*
19. *Licentia Concordandi.*
20. *King's Silver.*
29. *Concord.*
47. *Foot or Chirograph.*
52. *All the Proceedings on Fines muſt be recorded.*
54. *No Averment againſt the Chirograph.*
§ 56. *Of Motions to prevent Fines from being completed.*
58. *Of the Proclamations.*
68. *Felony for one Perſon to acknowledge a Fine in the Name of another.*
69. *At what Time a Fine is completed.*
72. *When a Fine begins to operate.*

Section 1.

Antient Manner of levying Fines.

A FINE has, in the preceding chapter, been deſcribed to be an amicable agreement or compoſition of a ſuit, whether real or fictitious, between the demandant and tenant, with the conſent of the judges, and inrolled among the records of the court, where the ſuit was commenced; by which, lands and tenements are transferred from one perſon to another, or any other ſettlement is made relating to lands and tenements.

§ 2. There is no ſmall difficulty in aſcertaining the manner in which fines were originally levied, on account of the ſcarcity of materials for ſuch an enquiry; for,

for, except what is to be found in the diſſertation which *Madox* has prefixed to his Collection of Antient Charters, and the few obſervations which *Dugdale* has made on this ſubject in his *Origines Juridiciales*, nothing has been collected, either by our lawyers or antiquaries.

§ 3. *Madox* ſeems to have thought, that a fine was not originally an accommodation of a ſuit, in the ſtrict ſenſe of the word, becauſe, in ſome of the moſt antient fines extant, no original writ appears to have been ſued out, nor any proceſs uſed, for the purpoſe of bringing the parties before the court; but they themſelves having accommodated the matters in diſpute, and drawn up an agreement in writing called a *chirographum*, which ſignified a deed of two parts, written on the ſame piece of paper or parchment, they then appeared in a court of juſtice, where they acknowledged it as their agreement, and mutually ſet their ſeals to it; and, upon payment of a certain fine, it was inrolled among the records of the court. Or elſe the parties entered into an agreement in court, where it was immediately reduced into the form of a *chirographum*, and recorded, and a copy delivered to each of the parties.

1 Inſt. 143 *b.* n. 4. Fleta lib. 3. c. 14. 5 Rep. Pref.

§ 4. This idea is confirmed by the opinion of the judges in the abbot of *Merton*'s caſe, who ſaid, that a fine was nothing more than a covenant between the parties, recorded by the juſtices; and if it were before juſtices of record, the parties being preſent, it was ſufficient; for the writ was ſued out, only to make the

Year Book, Paſch. 21 Ed. 4. fo. 4. No. 8. Mich. fo. 60. No. 32.

the parties appear; and if they were preſent, and would appear gratis, it was unneceſſary to ſue out a writ, but they might make a final covenant by record of the juſtices, and a fine was but a covenant of record: from whence, it may be contended, that fines were at firſt exactly ſimilar to the agreements which, in the time of the *Anglo-Saxons*, were entered into at the county courts; but a fine differs from thoſe agreements in two very material circumſtances: firſt, nothing appears to have been paid for permiſſion to enter into ſuch an agreement; and, ſecondly, it was not inrolled among the records of the court. It may alſo be obſerved, that this mode of levying a fine without an original writ, agrees exactly with the *tranſactio* of the civil law, which was not always an accommodation of a ſuit actually commenced, but an agreement relating to ſome doubtful matter, which muſt otherwiſe have become the ſubject of litigation. *Objectum ſive materia tranſactionis ſunt res dubiæ vel litigioſæ, de quibus ſcilicet vel nunc lis ſit, vel in futurum eſſe poſſit, aut mutuatur, nam litem motam eſſe nihil neceſſe eſt.*

§ 5. The obſervation of the judges in the abbot of *Merton*'s caſe, may alſo be accounted for on another principle. An original writ was not abſolutely neceſſary in *Bracton*'s time to the commencement of a ſuit, for, if the defendant would appear in court without a writ, the judges might proceed in the ſuit, *tot erunt formulæ brevium quot ſunt genera actionum, quia non poteſt quis ſine brevi agere, cum non teneatur alius ſine brevi reſpondere niſi gratis voluerit, et ex hoc ei non injuriatur, cum ſcienti et volenti non fit injuria.*

Bract. 413 *b.*

The law was, however, ſoon altered in this reſpect, for, when *Fleta* wrote, an original writ was become abſolutely neceſſary:—thus, in ſpeaking of the court of Common Pleas, he ſays, *Habet etiam curiam ſuam et juſticiarios ſuos reſidentes qui omnes recordum habent in his quæ coram eis fuerunt placitata, et qui poteſtatem habent de omnibus placitis et actionibus realibus et perſonalibus et mixtis, dum tamen warrantum per breve regis habuerint cognoſcendi, nam ſine warranto juriſdictionem non habent neque cohertionem.* Lib. 2. c. 54.

§ 6. It ſeems, however, to have been very ſoon eſtabliſhed, that no fine could be levied, unleſs upon a *placitum* or ſuit actually commenced in the uſual manner; for *Glanville* deſcribes a fine to be an accommodation of a ſuit actually commenced. *Contingit autem multoties loquelas motas in curia domini regis per amicabilem compoſitionem et finalem concordiam terminari, ſed ex conſenſu et licentia domini regis, vel ejus juſticiariorum, undecunque fuerit placitum, ſive de terra, ſive de alia re.* It even appears, that ſo early as the reign of *Hen.* 3., there was a particular *placitum* adapted to the purpoſe of levying a fine; thus *Madox* has tranſcribed a fine levied in the 27 *Hen.* 3. between *Ranulph*, abbot of *Ramſey*, and *Matthew de Layham*. *Unde placitum finis facti ſummonitum fuit inter eos in eadem curia.* Glan. l. 8. c. 1. Diſſert. ſ. 17.

§ 7. The modern manner of levying fines was ſettled by the ſtatute *De Modo Levandi Fines*, 18 *Ed.* 1. ſta. 4., by which it was enacted, that no fine ſhould thenceforth be levied, unleſs upon a ſuit actually commenced in the uſual way. So that a fine then became Modern Manner of levying Fines. 2 Inſt. 510.

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an accommodation of a ſuit in the moſt ſtrict and technical ſenſe: and, ſince the paſſing of that act, no material alteration has been made in the manner of levying fines.

5 Rep. 38 *b.*

§ 8. A fine now conſiſts of five parts. 1ſt, The Original Writ. 2d, The *Licentia Concordandi.* 3d, The Concord. 4th, The Note; and, 5th, The Foot, Chirograph or Indenture.

Original Writ. 5 Rep. 38 *b.*

§ 9. When the parties have agreed to levy a fine, the perſon to whom the land is to be conveyed, commences an action or ſuit at law againſt the vendor, by ſuing out a writ of covenant againſt him, the foundation of which is a ſuppoſed agreement or covenant that the vendor ſhall convey the lands to the purchaſer; on the breach of which agreement the action is brought.

As no ſuit can be commenced in any of the courts of common law without an original writ, and as a fine is a friendly compoſition of a ſuit actually commenced, it follows, that no fine can be levied without an original writ; and the ſtatute *de modo levandi fines* expreſsly ſays, "that the order of the common law will "not ſuffer a fine to be levied in the king's court "without an original." However, if the judges permit a fine to be levied without an original writ, it is not abſolutely void, but only voidable.

Co. Read. 10, 2 Inſt. 513.

5 Rep. 39 *a.* Salk. 340. Rep. Temp. Holt 322. Shep. Tou. 4.

§ 10. A fine may be levied on every writ by which lands may be demanded, charged, or bound; or which in any ſort concerns land. Such as a writ of meſne, *warrantia*

warrantia chartæ, de conſuetudinibus et ſervitiis, &c. But a fine cannot be levied on an original in a perſonal action. A fine may alſo be levied of an advowſon in a writ of right of advowſon, of which, *Madox* has given an inſtance of great antiquity. Mad. Diſſ. f. 15.

§ 11. The writ on which fines are now uſually levied, is a writ of covenant, which is in the realty, and lies where a man covenants to levy a fine to ſome other perſon of his lands and tenements. The form of the writ is thus:—*Præcipe A. quod teneat B. conventionem inter eos factam de manerio, &c. et niſi, &c.* Booth 247. Reg. Brev. 165 *a.* Fitz. N. B. 146.

§ 12. There muſt be fifteen days between the *teſte* and the return of this writ, and the *teſte* muſt not be on a *Sunday*, or any day that is not *dies juridicus*.

§ 13. In ſuing out a writ of covenant, there is a fine due to the king called the *primer-fine;* for in every real action for lands and tenements, of the yearly value of five marks, there is a fine of 6 *s.* 8 *d.* due upon the original in the Hanaper Office. 2 Inſt. 511.

§ 14. Where the ſheriff of the county in which the lands lie, is a party to the fine, the writ ought to be directed to the coroner: for, although the ſheriff is in general the proper officer to execute all writs, yet where the writ is brought againſt himſelf, it is the practice, in order to prevent partiality, to direct the writ to the coroner with this clauſe, *Quia prædictus A. B. eſt vicecomes comitatus D. fiat executio brevis prædict.* Done v. Smethier & Leigh, Cro. Car. 416. W. Jones 373.

dict. per coronatorem, ita quod vicecomes non se intromittat.

Co. Read. 10.

§ 15. If an original writ be countermanded by a *retraxit*, a fine cannot afterwards be levied on it.

Bro. Ab. Tit. Fine 82.

Thus, in an Aſſiſe, the plaintiff appeared and made a *retraxit;* afterwards, the judges recorded an agreement between the parties in the nature of a fine: and by the better opinion it was void, *et coram non judice*, becauſe when the agreement was made, there was no ſuit depending, the writ being determined by the *retraxit.*

§ 16. Formerly, if the king had died after the purchaſe of the original writ, the parties could not proceed to levy a fine on it, becauſe it was abated. But now it is otherwiſe; for by the ſtatute 1 *Ann*, c. 8. ſ. 5. no original writ, proceſs, or proceedings whatſoever, ſhall abate by the death of any king or queen.

§ 17. As the parties are not ſuppoſed to appear before the return day of the writ of covenant, it follows, that no agreement can take place between them until that period: and, therefore, if any of the parties die before the return day of the writ of covenant, the fine will be void.

Wright & M. of Wickham, Cro. Eliz. 468.

§ 18. A writ of error was brought to reverſe a fine levied by huſband and wife, and the error aſſigned was, that the writ of covenant upon which the fine was levied, bore *teſte* the 10th of *Auguſt* 12 *Eliz.*, and

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was returnable in *Michaelmas* term of the ſame year, which was the 27th of *October*. The fine was acknowledged before commiſſioners, and the wife died the 17th of *October*, which was before the return of the writ of covenant. The fine was reverſed.

The ſame point was determined in the caſes of *Price* v. *Davies*, *Comb.* 57—71. *Clements* v. *Langharne*, 2 *Lord Raym.* 872. *Watts* v. *Birkett*, *Barnes* 220. *Wilſ. Rep. p.* 2. 115.

§ 19. The ſecond part of a fine is the *licentia concordandi*, for as ſoon as the action is brought, the defendant knowing himſelf to be in the wrong, is ſuppoſed to make overtures of accommodation to the plaintiff, who accepts them, but having given pledges to proſecute his ſuit, applies to the court, upon the return of the writ of covenant, for leave to make the matter up, which is readily granted on payment of another fine. Licentia Concordandi. 5 Rep. 39 *a.*

§ 20. This fine is called the King's ſilver, and is paid on obtaining the *licentia concordandi*, becauſe the King by ſuch compoſition loſes the fines, amerciaments, and other advantages, that would have accrued to him upon the judgment or nonſuit, which in ancient times formed no inconſiderable part of the royal revenue. King's Silver. 2 Inſt. 511.

§ 21. The King's ſilver, which is ſometimes called the poſt-fine, with reſpect to the primer-fine, due on the original writ, is an ancient revenue of the crown, Idem.

and is as much as the primer-fine, and half as much more. It is entered on the writ of covenant in the following manner:—*Robertus Drury dat Dominæ Reginæ ſept. lib. pro licentia concordandi cum Thoma Tey arm. et Eleonora uxore ejus de placito conventionis de maneriis de, &c. &c. et habet chirographum per pacem admiſſum coram Jacobo Dier, &c.* And ſuch entry ought to contain, 1ſt, The ſum given for licence to compound. 2d, The party who pays it, that is, the perſon in whom the fee is to be veſted. 3d, The plea, and between whom: and 4th, The land for which the fine is paid.

5 Rep. 89 *a.*

§ 22. If any of the parties die before the entry of the King's ſilver, the fine is in general void; becauſe the King's ſilver not being due until the return of the writ of covenant, and being paid for permiſſion to accommodate the ſuit, the agreement of the parties cannot be conſidered as lawful until it is entered; and conſequently if the demandant or tenant dies before this is done, the fine will have no effect, being ſimilar to a judgment given in an adverſary ſuit, after the death of one of the litigating parties. If however it ſhould appear upon record that the King's ſilver was paid before the death of the cognizor, though in truth the fact be otherwiſe, the judges will ſupport ſuch a fine, and will not allow of any averment that the cognizor died before the entry of the King's ſilver, becauſe that would contradict the record.

Vide infra.

§ 23. A man and his wife acknowledged a fine before commiſſioners, the 26th of *March* 1621, and the

Farmer's Caſe, Hob. 330. Dyer 220 *b.*

the wife died on the 27th of the ſame month. The 28th, compoſition was made in the alienation office upon a writ of covenant, made returnable in *Hilary* term before, and the King's ſilver was entered in the office of the King's ſilver as of the ſame *Hilary* term, and ſo the fine was paſſed and engroſſed. The heir at law of the wife moved in the *Eaſter* term following againſt this fine, but upon debate the court reſolved that the fine muſt ſtand.

§ 24. A fine was acknowledged by a man and his wife on the 27th of *December* 1689, but by reaſon of King *James*'s abdication, and his carrying away the great ſeal, there followed a ſtay of proceedings at law, and the woman died on the 22d of *February*. The King's ſilver was paid as upon a writ of covenant in King *James*'s time, though no writ was then ſued out. Afterwards a writ of covenant was purchaſed, returnable in *Michaelmas* term preceding, ſealed with the ſeal of King *William* and Queen *Mary*, and the fine was engroſſed as of *Michaelmas* term. It was moved that this fine ſhould be vacated; but the court, after the cauſe had been twice argued, gave their opinion *ſeriatim* that the fine ſhould ſtand, as the entering of the King's ſilver after the death of the parties could not then be examined into, the fine being engroſſed and completed as a fine of *Michaelmas* term.

Anon. 2 Vent. 47.

Ball v. Cock, 3 Mod. 140.

§ 25. A fine was acknowledged before commiſſioners on the 13th of *May* 1754. The writ of covenant was teſted the firſt day of *Eaſter* term in five weeks (19th *May*). It was compounded, and the

Barber v. Nunn, Barnes 218.

pre-fine paid between the 17th and 20th of *May*, and after paſſing the return, warrant of attorney, and *cuſtos brevium* office, was brought to the King's ſilver office on the 11th of *June*, and the clerk then entered the King's ſilver or poſt-fine in his book, and on the writ of covenant. *Mary Nunn* the cognizor died on the 27th of *May*. A caveat to prevent the compleating of this fine was brought to the King's ſilver office the 13th of *June*, before the record was made up in form, on behalf of *John Nunn*, eldeſt ſon and heir of the cognizor. A rule to ſhew cauſe why that caveat ſhould not be withdrawn, was made abſolute, and the court utterly exploded the notion which prevailed, undoubtedly by miſtake, in the caſe of *Harneis* v. *Mickletwaite*, that the King's ſilver was the pre-fine, or fine for licence to alienate, whereas the King's ſilver is the poſt-fine, or fine given *pro licentia concordandi*. The return of the writ of covenant was agreed to have been in the life-time of *Mary Nunn*, the cognizor; and from that time the crown had a right to the poſt-fine, which was entered at the King's ſilver office before any caveat was entered againſt it. The making up the record in form is a miniſterial act, not neceſſary to be done previous to the caveat, as the entry of the clerk of the King's ſilver was ſufficient.

Barnes 214.

§ 26. When a year and a day has elapſed from the date of the caption, or acknowledgment of a fine, without entering the King's ſilver, an affidavit muſt be made that all thoſe who depart with any intereſt by the fine are ſtill living, otherwiſe the King's ſilver will not be received. And now that the King's ſilver is

Cotton v. Tyrrell, Barnes 215.

paid at the Alienation Office, if a year elapſes before the fine is carried to the King's ſilver office, an affidavit muſt be made that the parties were alive when the King's ſilver was paid.

Gregory v. Croucher, Barnes 215.

§ 27. By a rule of the Court of Common Pleas, made in *Eaſter* term 9 *Ann*, it is ordered, "That no "fine whatſoever taken and acknowledged before the "chief juſtice, or any judge of aſſiſe, or ſerjeant at "law, if the date of the caption of ſuch fine ſhall "appear to have been razed, ſhall for the future paſs "the Queen's ſilver office, and the Queen's ſilver of "ſuch fine be recorded, by the ſaid clerk of the "Queen's ſilver, before there be an order under the "hand of the ſaid chief juſtice, or ſome other juſtice "of this court, for his paſſing and entering ſuch fine "firſt had and obtained."

§ 28. Formerly the poſt-fine or King's ſilver was paid at the King's ſilver office; but by the ſtatute 32 *Geo.* 2. c. 14. it is enacted, *ſ.* 1. "That on every "writ of covenant which ſhall be ſued out for paſſing "of fines in the Common Pleas at *Weſtminſter*, the "officer whoſe duty it is to ſet and indorſe the pre-"fine payable thereon, ſhall, at the ſame time, ſet "the uſual poſt-fine, and indorſe the ſame on the "back of the ſaid writ, together with his name or "mark of office, in like manner as the ſame are now "indorſed at the King's ſilver office; which poſt-fine "ſhall be forthwith paid to the receiver of the pre-"fines at the Alienation Office, with 4*d.* as his fee "for receiving the ſame, inſtead of his fee of 4*d.*

" charged on lands and hereditaments, and payable " to ſheriffs, bailiffs, and others, on diſcharging the " ſame, by 3 *Geo.* 1. c. 15. which fee of 4*d.* by the " ſaid act granted, after the firſt day of *Trinity* term " 1759, ſhall ceaſe; and ſuch receiver ſhall indorſe " upon the back of every ſuch writ of covenant one " mark of office, as is now uſed by him on the re- " ceipt of pre-fines at the Alienation Office, with the " name of ſuch receiver, and the ſum received as the " poſt-fine, which mark of ſuch receiver ſhall diſ- " charge the manors, lands, and hereditaments com- " priſed in the ſaid writ of covenant, and the cog- " nizees named therein."

Sect. 2. " The officer or clerk of the King's ſilver " office, or his deputy, ſhall continue to enter every " fine upon record, in the way hitherto uſed, and " make the ſame entries, and put thereon the ſame " indorſements, with the ſame mark, and in like " manner as hath hitherto been the practice of the " ſaid office in paſſing fines; and no fine, until the " ſame be marked with the ſum to which the poſt-fine " amounts in the King's ſilver office, ſhall be effectual " in law."

Sect. 3. " Where no pre-fine is payable on any writ " of covenant, *viz.* where the lands are under the " yearly value of five marks, the officer at the Alie- " nation Office, whoſe duty it is to ſet pre-fines, ſhall " ſet on every writ of covenant brought to the ſaid " Alienation Office, on which no pre-fine is payable, " a poſt-fine of 6*s.* 8*d.* and ſhall indorſe ſuch poſt-

" fine

" fine of 6 *s.* 8 *d.* on every ſuch writ of covenant, " with his name and mark of office, as it has been " uſual; and every ſuch poſt-fine of 6 *s.* 8 *d.* ſhall be " paid to the receiver of the Alienation Office before " the writ of covenant, on which no pre-fine is pay- " able, be paſſed at the Alienation Office; and the " receiver on payment of the ſaid 6 *s.* 8 *d.* ſhall in- " dorſe and mark every ſuch writ of covenant, as " other writs of covenant are by this act directed to " be indorſed."

Sect. 4. " The officer or clerk of the King's ſilver " office, or his deputy, after the firſt day of *Trinity* " term 1759, ſhall not receive any writ of covenant, " unleſs it appear by the mark and indorſement of " ſuch receiver, that the poſt-fine has been paid."

Sect. 5. " If after the payment of ſuch poſt-fine, " the writ of covenant, by the death of any of the " parties, or other cauſe, be prevented from paſſing " through the ſeveral other offices, ſo as the ſaid fine " is not completed, then the ſaid receiver ſhall repay " to the cognizees, or their attorney, on producing " and filing with him the ſaid writ of covenant, every " ſuch ſum as has been by him before received for " the poſt-fine; and ſuch writ of covenant ſo remain- " ing filed with ſuch receiver, ſhall be a diſcharge to " ſuch receiver."

§ 29. The third part of a fine is the concord, or agreement entered into openly in the Court of Common Pleas, or before the Chief Juſtice of that court, Concord. 5 Rep. 39 *a.* Vide ch. 4.

or commiſſioners duly authoriſed for that purpoſe, which is the foundation and ſubſtance of the fine. It is uſually an acknowledgment from the *deforciants*, or thoſe who keep the others out of poſſeſſion, that the lands in queſtion are the right of the demandant; and from the acknowledgment or recognition of right thus made, the party who levies the fine is called the cognizor, and the perſon to whom it is levied the cognizee.

The form of the concord is thus: "And the agree-
" ment is ſuch; to wit, that the aforeſaid *A.* (the
" *deforciant* in the original writ) hath acknowledged
" the aforeſaid manors, lands, tenements, and heredi-
" taments, with the appurtenances, to be the right of
" him the ſaid *B.* (the plaintiff or demandant) and
" thoſe he hath remiſed and quit-claimed from him
" the ſaid *A.* and his heirs, to the aforeſaid *B.* and
" his heirs for ever. And moreover the ſaid *A.* hath
" granted for himſelf and his heirs, that he will war-
" rant to the aforeſaid *B.* and his heirs the aforeſaid
" manor, lands, tenements, and hereditaments, with
" the appurtenances, againſt him the ſaid *A.* and his
" heirs for ever."

§ 30. By the common law, the cognizor ſeems to have been bound to warant the lands to the cognizee, although no expreſs words to that purpoſe were inſerted in the fine. *Item ſufficit finis factus in curia Domini Regis, licet expreſſa warrantia vel homagium et ſervitium non intervenerit, dum tamen conſtiterit per*

Bract. 389 *a.* Item 382 *a.*

finem

finem & chirographum, quod illi qui tenet, tenere debeat de eo qui vocatur ad warrantum. But in courſe of time it became the practice to annex an expreſs warranty to all fines, which is ſtill continued.

§ 31. It was formerly the practice for the cognizor to make the cognizance (that is) to acknowledge the concord of the fine, before any original writ had been ſued out, and this cuſtom ſo far prevailed, that the judges uniformly ſupported ſuch fines; but in all caſes of this kind, an original writ muſt have been ſued out and made returnable on ſome day previous to that on which the concord was acknowledged; a *licentia concordandi* muſt alſo have been obtained, and the King's ſilver muſt have been regularly paid and entered; for theſe circumſtances were abſolutely neceſſary to complete the fine. Farmer's Caſe, Hob. 330.

§ 32. The practice of acknowledging the concord of a fine before the writ of covenant was ſued out, was often productive of great inconveniencies and irregularities, which are now prevented by a rule of the Court of Common Pleas, made in *Trinity* term 30 *Geo.* 3. by which it is ordered that, from and after the firſt day of *Michaelmas* term then next enſuing, every fine at the time of ſigning the judge's *allocatur* thereon ſhall have the writ of covenant ſued out and annexed thereto. 1 Hen. Black. Rep. 526.

§ 33. By the ſtatute 23 *Eliz.* c. 3. ſ. 5. it is enacted, "That every perſon that ſhall take the knowledge of "any

"any fine, or ſhall certify them, ſhall, with the cer-
"tificate of the concord, certify alſo the day and
"year wherein the ſame was knowledged. And
"that no clerk or officer ſhall receive any writ of
"covenant, whereupon any fine is to paſs, unleſs the
"day of the knowledge of the ſame fine ſhall appear
"in, or by ſuch certificate, upon pain that every
"clerk that ſhall receive any ſuch writ ſhall forfeit
"for every time that he ſhall ſo offend the ſum of
"five pounds."

§ 34. The concord of the fine comes in lieu of the ſentence which would have been given in caſe the parties had not compounded the cauſe; and is therefore exactly of a ſimilar nature, and attended with the ſame conſequences as a judgment in an adverſary
Co. Read. 6. ſuit. The cognizance muſt therefore be made of thoſe things only, and to thoſe perſons only who are named in the original writ on which the fine is levied, becauſe the cognizance being in the nature of a judgment binds only thoſe perſons and things which are judicially before the court.

Co. Read. 6. § 35. This rule however admits of a few exceptions, for a remainder may be limited in the concord of a fine, to a perſon not named in the original writ, in the ſame manner as a remainder may be limited in a deed to a perſon who is not a party to it.

Co. Read. 11. § 36. If a *præcipe* be brought againſt a tenant for life, and upon his default the perſon in reverſion is received,

received, he may levy a fine of his reverſion to the demandant, although he is not named in the original writ. In the ſame manner if a fine is levied by a vouchee to the demandant, or by a demandant to the vouchee, it will be good; but a fine levied by a vouchee to a ſtranger is void. 3 Rep. 29 *b*.

The reaſon of the two laſt caſes is, becauſe the perſon in reverſion and the vouchee, are allowed by the court, to come in the place of the tenant againſt whom the *præcipe* was originally brought; and, having thus been made parties to the ſuit, they are bound by the judgment, as much as if they had been named in the original writ.

§ 37. The object of fines being to ſettle the poſſeſſion, not only for the preſent but for ever, in the moſt certain and ſecure manner, the judges never allow lands to be limited in the concord of a fine to two perſons and their heirs, but always direct the lands to be limited to the two perſons, and to the heirs of one of them. Bro. Ab. Tit. Fine 7. 5 Rep. 38 *b*. Co. Read. 8.

§ 38. The neceſſity of the caſe, however, requires that where the lands comprehended in the fine are held by gavelkind tenure, this rule ſhould be diſpenſed with; and therefore when a fine was levied of lands held in gavelkind, the judges will permit them to be limited to two or more perſons and their heirs. Robinſon's Gavelk. 133.

§ 39. A war-

Co. Read. 3. Rob. Gav. 132. Bro. Ab. Tit. Fine 65.

§ 39. A warranty ought not to be allowed in the concord of a fine from two perſons and their heirs for the ſame reaſon; but a warranty has been allowed from three perſons and their heirs where the eſtate was held in gavelkind.

2 Rep. 74 *b.* 5 Rep. 38 *b.*

§ 40. The judges ought not to permit a fine to be levied upon condition, nor ſhould a ſaving or exception, or a clauſe of re-entry be allowed in a fine. But let it be obſerved that if a fine is actually levied to two perſons and their heirs, or with a warranty from two perſons and their heirs, or upon condition, with a ſaving, exception, or clauſe of re-entry, ſuch a fine will notwithſtanding be valid, upon the principle that *fieri non debuit ſed factum valet, et facta tenent multa quæ fieri prohibentur.* And *Plowden* has given ſome inſtances of fines levied on condition, which were allowed to be good.

12 Rep. 125. Plowd. 34.

2 Inſt. 512. Dyer 227.

§ 41. Lands ſituated in different counties may be contained in the ſame concord, but there muſt be ſeveral writs of covenant.

Wilſon 47.

§ 42. Formerly lands purchaſed of different perſons were allowed to be compriſed in the ſame concord, and every vendor warranted againſt himſelf and his heirs only. But by an order of the Lord Chancellor *Hatton*, reciting, that by theſe kinds of fines her majeſty was defrauded of the profits of her poſt-fines, and of the ſeals on writs, and the Chancellor and other officers loſt their fees, the curſitors are authoriſed

thoriſed to ſtay a writ where there is more than one demandant, and one deforciant, except coparceners, joint-tenants, and tenants in common. But the curſitors will permit two ſeparate purchaſes to be compriſed in one fine, on an affidavit that the value of both together does not exceed two hundred pounds.

§ 43. The *concordia facto in curia* is the complete fine, and therefore, if after the concord is acknowledged in court, one of the cognizors dies, ſtill the cognizee may proceed with his fine againſt the ſurviving cognizor.

§ 44. Where two brothers acknowledged the concord of a fine before Lord Chief Juſtice *Hobart*, and then the elder brother died, ſeveral motions were made for the proceeding and ſtaying of the fine; but the Chief Juſtice was clearly of opinion, that the cognizee might proceed with his fine as againſt the ſurviving brother, and take out his writ of covenant accordingly; the death of his elder brother being no impediment, for the acknowledgment of each perſon was good againſt himſelf, and ſhould operate for as much as he could paſs. Erſfield's Caſe, Hob. 329.

§ 45. A fine was ſtopped at the King's ſilver office for want of an affidavit that the parties were living, a year having elapſed ſince the acknowledgment; and one of the cognizors being dead, application was made to the judges that he might be ſtruck out, and that the fine might paſs as to the other cognizor. This motion was denied, but a rule was made that the ſurviving Cotton v. Baylie, Barnes 215.

ſurviving cognizor ſhould ſhew cauſe why the fine ſhould not paſs generally as to all the parties; and upon affidavit of ſervice, the rule was made abſolute.

Note.

§ 46. The fourth part of a fine is the note, which is an abſtract of the writ of covenant, and the concord; and is only a docket taken by the chirographer, from which he forms the chirograph. It is ſometimes taken in the old books for the concord.

5 Rep. 39 *a.*

Foot or Chirograph.

§ 47. The fifth and laſt part of a fine is the foot, chirograph, or indenture, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there are indentures made or ingroſſed at the chirographer's office, and delivered to the cognizor and cognizee, beginning with theſe words—*Hæc eſt finalis concordia*, and then reciting the whole proceeding at length; thus the fine is completely levied at common law.

Co. Read. 1.

§ 48. A fine is ſaid to be ingroſſed when the chirographer makes out the indentures, and delivers them to the parties. But it is not abſolutely neceſſary that a fine ſhould be ingroſſed, provided it be recorded; for Lord *Coke* obſerves, that a fine is a perfect record before it is ingroſſed.

§ 49. A fine may be ingroſſed at any time after it is levied.

Sir

Sir *John Brome*, in 33 *Hen.* 8. acknowledged a fine of certain lands. The King's ſilver was entered, and the cognizance taken; and in 29 *Eliz.* the perſon who claimed under this fine came into court, and prayed that the fine might be engroſſed, it appearing upon examination, that the party to whom the fine was levied was ſeiſed after the fine, and ſuffered a common recovery of the land, which had been enjoyed according to the ſaid fine ever ſince. The court ordered the fine to be engroſſed. Sir J. Brome's Caſe, 4 Leon. 96. Dyer 254 a.

§ 50. The record of the fine which remains in the poſſeſſion of the chirographer is the *principale recordum*; ſo that if there is any difference between it and the record which remains with the *cuſtos brevium*, that which continues with the chirographer is conſidered as the true record. 3 Leon. 183. Caſe 234. Godb. 103.

§ 51. The chirograph of a fine is evidence to all perſons, and in all courts, of ſuch fine; becauſe the chirographer being an officer appointed by the law for the purpoſe of tranſcribing fines from the record, his copies muſt be allowed to be authentic. Gilb. Evid. 24. Buller N. P. 229.

§ 52. There are two petitions of the Commons in the rolls of Parliament, 4 *Hen.* 4. N° 35. and 5 *Hen.* 4. N° 28. ſtating, that many fines of land remained in the King's treaſury, and the notes of ſuch fines remaining in the Court of Common Pleas, had been taken away, and other fines and notes of fines counterfeited and put in their places, whereby many perſons were diſinherited; in conſequence of which, a All the Proceedings on Fines muſt be recorded. Rot. Parl. Vol. 3. 495. 543. 557, 558.

ſtatute was immediately paſſed, 5 *Hen.* 4. c. 14. enacting, that all the proceedings on fines, both previous to and at the acknowledgment thereof, ſhould be inrolled of record in the Court of Common Pleas. And by the 23 *Eliz.* c. 3. § 1. & 6. it is enacted, that every writ of covenant and other writ, whereupon any fine ſhall be levied, the return thereof, the writ of *dedimus poteſtatem* made for the knowledging of any of the ſame fines, the return thereof, the concord, note and foot of every ſuch fine, the proclamations made thereupon, and the King's ſilver, may, upon the requeſt or election of any perſon, be inrolled in rolls of parchment; and that the inrolments of the ſame, or of any part thereof, ſhall be of as good force and validity in law, to all intents, reſpects, and purpoſes, for ſo much of any of them ſo inrolled, as the ſame, being extant and remaining, were or ought by law to be.

§ 53. The office of the chirographer of fines was burnt down in the year 1679, whereby ſeveral records of fines which had been levied in *Trinity* and *Michaelmas* term preceding, were either burnt or loſt. In conſequence of which an act was paſſed, 31 *Car.* 2. c. 3. reciting, that the fines ſo burnt or loſt had duly paſſed all the offices; ſo that by the records of the King's ſilver, the notes of the curſitor who made out the writs of covenant, and the entries thereof at the office of alienation, and by the book of entries of fines kept by the chirographer's deputy, *&c.* the full contents of all ſuch fines would appear. But for want of the records of the fines ſo burnt or loſt, purchaſers

and

and others, whoſe titles were ſecured under the ſaid fines, were in danger of having the ſame impeached. It was therefore enacted, that the ſaid chirographer or his deputy ſhould, before the end of the next *Trinity* term, upon oath certify to the Juſtices of the Common Pleas, a note of all ſuch fines entered into the ſaid book kept by the ſaid deputy, that he, upon diligent ſearch, ſhould find, were either burnt or loſt, by reaſon of the ſaid fire; which certificate ſhould be in parchment, fairly written, and a copy thereof ſet up in *Weſtminſter-Hall*, *&c.* and that any time within three years, the Chief Juſtice of the ſaid Court of Common Pleas, together with any one or more of the Juſtices of the ſaid court, ſhould have power to ſend for any officer's books, records, *&c.* and upon full examination of any ſuch fine, the records whereof were burnt or loſt, ſhould direct the ſaid chirographer or his deputy to new-engroſs the note and foot of ſuch fine without fee, and to carry the ſame before the ſaid Chief Juſtice, and ſuch other of the ſaid juſtices as ſhall have taken the examination concerning the burning or loſs of ſuch fine, who are required to ſubſcribe their names at the bottom of the ſaid note and foot; and every ſuch fine whereof the record ſhould be ſo new-engroſſed, ſhould be of the ſame force and effect, as if it had ſtill remained upon record unconſumed or not loſt.

§ 54. It is a principle of the common law, that the evidence of a record is of ſo high and certain a nature, that its authenticity is never permitted to be called in queſtion; ſo that no averment can be made againſt any fact which is once upon record; and, therefore, when

No Averment againſt the Chirograph. 1 Inſt. 260 *a.* Dyer 89 *b.*

the foot, or *chirographum* of a fine is recorded, no averment can be made as to the caption or time of its acknowledgment, but it must be considered as a fine of that term in which it is recorded.

Lloyd v. Vis. Say and Sele, 1 Brown 379. Salk. 341. 10 Mod. 40. 4 Bro. Parl. Ca. 73.

§ 55. Upon a trial at bar, in ejectment, it appeared, that *Nathaniel* Lord Viscount *Say* and *Sele* being tenant in tail of the premises in question, with remainder over, levied a fine in *October* 1701, and, in *Michaelmas* term following, suffered a recovery: and to prove this, the *chirograph* of a fine was produced, importing, that *Nathaniel* Viscount *Say* and *Sele* levied that fine on the 23d of *October* 1701; and the exemplification of a common recovery was also produced, which appeared to have been suffered on the 18th of *November* 1701. The question was, whether the cognizee of the fine had the freehold in him when the recovery was suffered?

It was insisted by the plaintiff's counsel that he had not; for that the fine given in evidence to make him so, was not in fact acknowledged, until the 2d of *March* 1701, which was four months after the recovery was suffered; and, to support this fact, they offered to produce and prove, 1st, The record of the recognizance, or acknowledgment of the fine, under the hand of the Lord Chief Justice *Trevor*, whereby it appeared, that the acknowledgment thereof was made and taken before the said Lord Chief Justice on the 2d day of *March* 1701, and not before. 2dly, That the acknowledgment of the fine was the very true acknowledgment or recognizance of the concord

upon which the fine given in evidence paſſed, and upon which the *chirograph* of that fine was made and engroſſed. And, 3dly, They offered to produce the files of the Court of Common Pleas of the acknowledgment of all fines in *Michaelmas* term 1701, whereby it would appear that Lord *Say* and *Sele* did not acknowledge any fine whatſoever, of or in that term at any time before the ſuffering the common recovery. But the Court of Queen's Bench refuſed to admit any of the matters offered againſt the fine to be given in evidence, being of opinion, that no proof or evidence of the time of the acknowledgment of a fine ought to be admitted, contrary to, or againſt the *chirograph* thereof; and that the record, which is the *chirograph* of the fine, cannot be falſified until it is vacated or reverſed.

From this judgment, a writ of error was brought in the Houſe of Lords; and one of the errors aſſigned was, becauſe the records and matters offered to be given in evidence, were not admitted or allowed by the court to be given in evidence to prove the true time of acknowledging the fine. In ſupport of which, it was inſiſted, that as the fine was not in fact acknowledged until the 2d of *March*, it could not transfer the freehold of the lands to the tenant to the *præcipe* three months before the time of that acknowledgment; and that the plaintiff was admitted to the proof of this fact, by the ſtatute 23 *Eliz.* c. 3. ſ. 5., which directs, that the time of the acknowledgment ſhall be certified by thoſe who take ſuch acknowledgment; for, if a man cannot give in evidence the time of acknowledging a

fine, in order to avoid deceit impoſed upon him by that fine, this ſtatute would anſwer no purpoſe.

On the other ſide, it was contended, that the caption of the fine ought not to be admitted againſt the record or indenture of the fine; for it would ſhake all family ſettlements, and introduce the greateſt uncertainty and confuſion in all conveyances by fines, upon which the moſt conſiderable eſtates in the kingdom depended; and that an attempt to ſet aſide a fine upon evidence was never before made. That, in the indentures of all fines, the concord is recorded to be made in court; whereas the captions of the acknowledgments of all fines (except a very few) are taken out of court, either before the Lord Chief Juſtice of the Common Pleas, or commiſſioners in the country; and upon a writ of error, no error can be aſſigned in the caption varying from the record, as that would be an error contrary to the record: but if, in the preſent caſe, the fine was irregular, the proper method was to apply to the Court of Common Pleas where the ſame was levied, and not attempt, in a ſummary way, to invalidate it by evidence in ejectment. The judgment was affirmed.

Vide infra. ch. 14.

Of Motions to prevent Fines from being completed.

§ 56. Applications are ſometimes made to the Court of Common Pleas to prevent fines from being completed, on a ſuggeſtion, that the parties are diſabled by law from levying ſuch fines.

Wilſon 96.

By a rule of court made *Hil.* 28. and 29 *Car.* 2., all perſons making any complaint againſt fines acknowledged

ledged by infants, feme-coverts, without the conſent of their huſbands, or perſons of *non ſane memorie*, or otherwiſe diſabled by law to acknowledge the ſame, or by any perſon in the name of another, or by the like deceit, and obtaining rules for the ſtaying of ſuch fines, ſhall, from term to term, ſo long as they ſhall expect benefit or obſervance of ſuch rules, enter and continue the ſame rule for that term, or leave copies thereof with the cuſtos brevium, clerk of the king's ſilver, and chirographer, that the ſame may thereby be the better taken notice of; or, in default thereof, the ſaid officers, or any of them, ſhall not ſtand farther obliged thereby.

And all perſons concerned in the obtaining or proſecuting ſuch rules for the ſtaying of ſuch fines ſo levied as aforeſaid, their attornies and clerks, are thereby enjoined every term, to ſearch and ſee the books and entries of fines with the clerk of the king's ſilver, or other officer, where entries are kept for that purpoſe.

§ 57. By a rule of court made *Paſch.* 29 *Car.* 2., all manner of *caveats* and orders for the ſtopping any fines ſhall be renewed every term, and copies thereof left with the clerk of the king's ſilver, for which he is to demand only his antient fee of 3 *s.* 4 *d.* the term; and in default thereof, all *caveats* that ſhall not be ſo renewed, ſhall loſe their force and be void.

§ 58. When fines became a general mode of aſſurance, it became neceſſary to render the levying of them a matter of the moſt public notoriety, on account of thoſe whoſe Of the Proclamations.

rights might be barred by not making their claim in due time. For this purpoſe, it was enacted by the 27 *Edw.* 1. c. 1., that the notes of all fines ſhould, in future, be openly read in the Court of Common Pleas at two certain days in one week, and that, during ſuch reading, all pleas ſhould ceaſe.

§ 59. By the ſtatute 4 *Hen.* 7. c. 24. ſ. 1. it is enacted, "That after engroſſing of every fine, it ſhall be "read and proclaimed in open court the ſame term, "and in three terms then next following the ſame en- "groſſing, in the ſame court, at four ſeveral days in "each term, and, in the ſame time that it is ſo read, "all pleas to ceaſe."

Since the making of this act, the proclamations are indorſed on the foot of the fine, and are conſidered as matters of record.

Plowd. 371. § 60. By the words of the ſtatute 4 *Hen.* 7., if one of the three terms immediately ſubſequent to that in which a fine was levied, was adjourned, the proclamations would have been ineffectual, and this defect could not have been ſupplied in the next term; to remedy which, a ſtatute was paſſed 1 *Mary*, c. 7. ſ. 2. enacting, "That all fines, whereupon the proclamations "ſhould not, by reaſon of the adjournment of any "term by writ, be duly made, ſhould be of as good "force, effect, and ſtrength, to all intents and pur- "poſes, as if the term had not been adjourned."

It

It has been determined by all the judges, that even an adjournment of part of a term was provided for by this act, becauſe it was a favourable law, and to be conſtrued by equity. Dyer 186 *a.* 2 Inſt. 519.

§ 61. By the 31 *Eliz.* c. 2. it is enacted, that all fines ſhall be proclaimed only four times, that is to ſay, once in the term wherein they are engroſſed, and once in every of the three terms holden next after the ſame engroſſing; and that every fine proclaimed as aforeſaid, ſhall be of as great force and effect in law, to all intents and purpoſes, as if the ſame had been ſixteen times proclaimed.

§ 62. Since the ſtatute of 4 *Hen.* 7. fines have been diſtinguiſhed into fines at common law, and fines with proclamations: it is in the election of every perſon who levies a fine, to have it proclaimed in the uſual manner, or not. And if the cognizee dies before the proclamations are made, his heirs may cauſe the fine to be proclaimed. 5 Rep. 86 *b.* Wakefield v. Hodgſon, Cro. Eliz. 692.

§ 63. The ſtatute directs, that the proclamations ſhould be made not only during term, but alſo in court, at the time when the judges are ſitting: ſo that, if the proclamations happen to be made either before the beginning or after the end of term, or on a *Sunday* or other feſtival day on which the court does not ſit, being *dies non juridicus*, the proclamations will be all void. And, although the proclamations ſhould be made on days which were *dies juridici*, yet, if the contrary Fiſh v. Brocket, Plowd. 265; Dyer 181 *b.*

trary appears on record, the proclamations are void, as no averment can be admitted againſt the record.

Dyer 216 *a.* 1 Bulſt. 206.

§ 64. An error in the proclamations would not, however, deſtroy the validity of the fine, for it would ſtill enure as a fine at common law; becauſe the fine, taken ſeparately, is one perfect matter of record, before the proclamations are made, which binds the parties and the right of the land, and the proclamations are diſtinct and different from the fine, they and the fine being ſeveral matters of record; for which reaſon, error in the one is not error in the other. But if the fine is erroneous, the proclamations are then void, becauſe the fine is the principal, and *ſublato ſubjecto tollitur ejus accidens.*

Ragg and Bowley's Caſe, 3 Leo. 196.

§ 65. If the proclamations on a fine be certified in a *certiorari* by the *cuſtos brevium*, and it appears by the certificate that two of the proclamations were made in one day, a new *certiorari* may be directed to the chirographer, and if he certifies that the proclamations were well and duly made, the court will direct the proclamations in the office of the *cuſtos brevium* to be amended according to the proclamations in the chirographer's office, becauſe the chirographer makes the proclamations, and is the principal officer as to them; and the *cuſtos brevium* has only an abſtract of them.

Gilb. Evid. 25. Buller N. P. 229.

§ 66. When a fine with proclamations is given in evidence, the proclamations muſt be examined by the roll, becauſe the chirographer is not appointed by the ſtatute

ſtatute to copy the proclamations, as he is to copy the concord.

§ 67. By the 23 *Eliz.* c. 3. ſ. 6. it is enacted, that the chirographer ſhall, every term, write out a table of the fines levied in each county in that term, and ſhall affix it in ſome open part of the Court of Common Pleas all the next term; and ſhall alſo deliver the contents of each table to the Sheriff of each county, who ſhall at the next aſſiſes fix the ſame in ſome open part of the court.

Felony for one Perſon to acknowledge a Fine in the Name of another.

§ 68. It was formerly a practice, for one perſon to acknowledge a fine in the name of another; and, in ſuch caſes, the Court of Star Chamber, within whoſe juriſdiction frauds of this kind were conſidered, could only puniſh the offender by impriſonment. But by the ſtatute 21 *Jac.* 1. c. 26. it is enacted, that all and every perſon and perſons who ſhall acknowledge any fine in the name of any other perſon, not privy or conſenting to the ſame, and ſhall be lawfully convicted thereof, ſhall ſuffer death without benefit of clergy.

At what Time a Fine is completed. 2 Inſt. 517.

§ 69. With reſpect to the time when a fine is completed, Lord *Coke*, in his Comment on the Statute *De Modo Levandi Fines*, ſays, "A fine is ſaid to "be levied when the writ of covenant is returned, "and the concord and the king's ſilver duly entered; "this maketh the land to paſs; and from this ſhall "the year and day be accounted, albeit the fine be "engroſſed afterwards."

The

The modern method of levying a fine by firſt acknowledging the concord, then ſuing out an original writ, and paying the king's ſilver, has given riſe to a different mode of expreſſing the rule laid down by Lord *Coke*; for a fine is now ſaid to be completed upon the entry of the king's ſilver, (provided it was previouſly acknowledged); and if any of the cognizors die before the remaining parts of the fine are perfected, ſtill the fine will be valid.

§ 70. This principle has ſo far prevailed, that the court will not prevent a fine from being completed after the king's ſilver is paid, if the parties are alive.

Petty's Caſe. 3 Freem. 78.

A motion was made to ſtay the paſſing of a fine, which was acknowledged by an infant of 13 years old; the court ſaid, as the king's ſilver was paid, it was gone too far. But they aſſigned the infant a guardian, who had inſtructions to bring a writ of error to reverſe it.

§ 71. In conſequence of the rule of court already ſtated, by which it is directed, that the writ of covenant ſhall in future be ſued out before the concord is acknowledged, it may now be laid down, that a fine is completed when the concord is duly acknowledged.

When a Fine begins to operate.

§ 72. Although it muſt be very material, in many inſtances, to fix the preciſe time when a fine begins to operate, yet it is a ſubject reſpecting which very little is to be found in the writers on law. But if we reaſon by

by analogy from the nature and effects of other judgments, we shall be able to ascertain this point.

The time when a fine is acknowledged, is perfectly immaterial in this respect; for we have already seen an instance, where it was determined, that a fine began to operate in *Michaelmas* term, although it was not acknowledged until four months after. Ante f. 55.

§ 73. The term in law, is considered to many purposes as but one day; and if a judgment be given at any time during the term, it relates to the first day of that term, and is considered, in law, as having been given on that day; and the first day of term is the essoin day, for the *quarto die post* is only a day of grace. However, if a writ is returnable on the second or any other return-day of the term, the judgment will then relate to that return-day, for, until the return of the writ, the judgment cannot possibly be given. Cro. Car. 102.

§ 74. A fine being considered as a judgment, must, like all other judgments, relate to the first day of term in which it is recorded, if the writ of covenant whereon it is levied be returnable the first day of term, otherwise it must relate to the return-day of the writ of covenant; for, in levying a fine, there is no continuance of process to retard the relation, as the *licentia concordandi* is supposed to be obtained on the return of the writ of covenant, and the concord immediately acknowledged.

§ 75. In

§ 75. In ſupport of this propoſition, I ſhall tranſcribe a caſe reported by *Jenkins*, of which, I preſume, the authority will not be diſputed, although the reporter has not mentioned when, or by what court, it was determined.

Jenk. 250. " *A.* covenants with *B.* to levy a fine *Oct. Michaelis* " 1 *Car.* *A.* acknowledges a ſtatute to *C.* 8th *October* " ſame year. The fine is levied according to the co- " venant, and the conuſance taken the 12th *October* " aforeſaid. This conuſee ſhall avoid ſaid ſtatute by " relation to the day of the eſſoin, which was before " the ſaid 8th day of *October*."

Vol. 3. p. 170. § 76. In a note of Mr. *Peere Williams*, it is ſaid, that if *A.* deviſes land and levies a fine, and the caption and deed of uſes are before the will, but the writ of covenant is returnable after the will, this ſeems a revocation; becauſe a fine operates as ſuch from the return of the writ of covenant, and not from the caption; and yet (ſays the reporter) this is a hard caſe, ſince by the caption the party conuſor does all his part, and the reſt is only the act of the clerk or his attorney, without any particular inſtructions from the party.

1 Burr. 711. Theſe paſſages, and the concluſions drawn from the rules by which all other judgments are conſtrued, ſeem fully to prove, that a fine, whether it be acknowledged before or after the original writ on which it is levied is ſued out, will begin to operate from the return-day of ſuch original writ.

TITLE

TITLE XXXV.

FINE.

CHAP. III.

Of the ſeveral Sorts of Fines.

§ 1. *Fines executed, and executory.*
9. *Fines ſur Cognizance de Droit come ceo, &c.*
17. *Fines ſur Cognizance de Droit tantum.*
§ 21. *Fines ſur Conceſſit.*
22. *Fines ſur Done Grant and Render.*

Section 1.

Fines executed and executory.

WHENEVER a judgment is obtained, whether in an adverſary or an amicable ſuit, the next ſtep is, to procure the execution of it, by obtaining the actual poſſeſſion of the thing recovered: and, for this purpoſe, the law has provided, that in all real actions, the perſon who recovers, ſhall have a writ of *habere facias ſeiſinam*, directed to the ſheriff of the county in which the lands are ſituated, commanding him to deliver the poſſeſſion according to the judgment.

Ante f. 4.

Fines having at all times been conſidered as judgments in adverſary ſuits, a writ of *habere facias ſeiſinam* always iſſued to put the party in poſſeſſion who acquired the lands by a fine. When fines became common aſſurances, the purchaſer, in order to avoid the trouble and expence of ſuing out a writ of poſſeſſion, had, in ſome inſtances, livery of ſeiſin given him in the country, and,

and, for his further aſſurance, obliged the vendor to covenant that he would levy a fine to him; but as the purchaſer was already in poſſeſſion, no writ of *habere facias ſeiſinam* was deemed neceſſary.

Co. Read. 2. § 2. This practice gave riſe to the diſtinction between fines executed and fines executory. A fine executed immediately transferred the poſſeſſion from the cognizor to the cognizee, who might therefore enter on the lands which had been conveyed to him by the fine, as ſoon as it was levied.

A fine executory did not, of its own force, give immediate poſſeſſion in law to the cognizee, as he could not immediately enter on the lands; but it was neceſſary that he ſhould ſue out a writ of *habere facias ſeiſinam*, in order to gain poſſeſſion of that which he had acquired by the fine.

1 Inſt. 320 a. Shep. Tou. 253. § 3. The cognizee of a fine could not diſtrain before entry, becauſe an avowry came in lieu of an action, to which privity was requiſite; for the ſame reaſon, he could not have an action of waſte, a writ of entry *ad communem legem in conſimili caſu*, or in *caſu proviſo*.

Gilb. Ten. 102. But the cognizee might take thoſe things which the lord might ſeize or enter upon, without bringing any action, as a heriot, lands fallen by eſcheat, or might enter for an alienation of a tenant for life.

2 Inſt. 469. § 4. Where the cognizee of a fine executory had ſuffered a year and a day to elapſe from the time when the fine was levied, without ſuing out a writ of *habere facias*

facias ſeiſinam, he muſt then have ſued out a writ of *ſcire facias*, which might alſo be ſued out by the heir of the cognizee.

§ 5. By this writ, the ſheriff was commanded to warn the terre-tenants to appear and ſhew cauſe, if they could, why the cognizee of the fine, or his heirs, ſhould not have execution of the fine. And if at the return of the *ſcire facias* the terre-tenants did not ſhew ſome cauſe to the contrary, the plaintiff or cognizee became entitled of courſe to a writ of *habere facias ſeiſinam*.

§ 6. If the party to whom the eſtate was limited by a fine executory was in poſſeſſion at the time when ſuch a fine was levied, he need not have ſued out a writ of *habere facias ſeiſinam*; for, in that caſe, the fine would enure by way of extinguiſhment. Shep. Tou. 4.

§ 7. If a fine executory was levied of a reverſion depending on an eſtate for life, or years, or of a ſeignory, or any thing which lay in grant, they would paſs immediately, becauſe it would be impoſſible to give actual poſſeſſion of them. 1 Rep. 97 *a*.

§ 8. Since the ſtatute of uſes 27 *Hen.* 8. writs of poſſeſſion are never ſued out where fines are levied to uſes, for the ſtatute executing the poſſeſſion to the uſe, the cognizee is immediately in poſſeſſion without attornment; and by the 4th and 5th *Ann*, c. 16. attornment after a fine is become unneceſſary, ſo that writs of poſſeſſion are now totally diſuſed. Booth 250. Pigot 49. 6 Rep. 68 *a*.

Fines

2 Comm. 352. Fines are again divided into four ſorts; 1ſt, *Fines ſur cognizance de droit come ceo, &c.* 2d, *Fines ſur cognizance de droit tantum.* 3d, *Fines ſur conceſſit.* 4th, *Fines ſur done grant et render.*

Fines ſur Cognizance de Droit come ceo, &c.

§ 9. A fine *ſur cognizance de droit come ceo qu'il a de ſon done* is the beſt and ſureſt kind of fine; for the deforciant, in order to keep his ſuppoſed covenant with the plaintiff, of conveying him the lands in queſtion, and at the ſame time to avoid the formality of an actual feoffment, with livery of ſeiſin, acknowledges in court a former feoffment or gift in poſſeſſion, to have been made by him to the plaintiff; ſo that it is rather an acknowledgment of a former conveyance than a conveyance originally made; for the deforciant acknowledges, *cognoſcit*, the right to be in the plaintiff, or cognizee, as that which he had *de ſone done*, of the proper gift of himſelf, the cognizor.

1 Inſt. 50 *b.* 1 Salk. 339. 3 Atk. 141.

§ 10. This ſpecies of fine has been called a feoffment of record; but this expreſſion is by no means accurate; for there are caſes in which a feoffment has a more extenſive operation than a fine; and, therefore, Sir *William Blackſtone* has juſtly obſerved, that it might, with more accuracy be called an acknowledgment of a feoffment on record.

§ 11. The form of this fine is; "And the agree-
"ment is ſuch, to wit, that the aforeſaid *A.* hath ac-
"knowledged the aforeſaid manor, *&c.* to be the right
"of him the ſaid *C.* as that which the ſaid *C.* hath of
"the gift of the aforeſaid *A.*, and that he hath remiſed

"and quit-claimed from him the ſaid *A.* and his heirs "to the aforeſaid *C.* and his heirs for ever."

§ 12. This ſpecies of fine is executed, and therefore gives the cognizee immediate poſſeſſion of the land. Co. Read. 2.

§ 13. It alſo paſſes an eſtate in fee-ſimple without the word *heirs*; for when the cognizor acknowledges the lands to be the right of the cognizee, it would be repugnant and contradictory to his own acknowledgment to claim any eſtate in the lands in remainder or reverſion. Beſides in every judgment a fee-ſimple was recovered, and the cognizance or acknowledgment of the concord coming in the place of a judgment, muſt have the ſame effect. 1 Inſt. 9 *b*.

§ 14. But if the concord is qualified by the expreſs words of the parties, as if the lands are limited to the cognizee for life, or to the cognizee and the heirs of his body, the fine will then only paſs an eſtate for life, or an eſtate in tail; for it would be abſurd that a greater eſtate ſhould paſs than that which the parties themſelves have limited; and the preceding donation or feoffment which is acknowledged in the fine, may as well be ſuppoſed to have been for life, or in tail, as in fee. 1 Salk. 340.

§ 15. A rent cannot be reſerved on a fine *ſur cognizance de droit come ceo*, or on any other fine which is executed; becauſe, as the cognizance ſuppoſes a preceding gift, the cognizor cannot reſerve to himſelf any thing out of lands, whereof he has already conveyed Bro. Ab. Tit. Fine pl. 30.

away the abſolute property; ſo that the *reddendum* comes too late, when a precedent abſolute gift without any ſuch reſervation is before acknowledged.

Roll. Ab. Tit. Fine (O) pl. 10.

§ 16. But if an eſtate for life only be conveyed by the fine, the cognizor may then reſerve a rent with a clauſe of diſtreſs; becauſe not having acknowledged the entire and abſolute property to be in the cognizee, it is not repugnant to reſerve a rent out of it.

Fines ſur Cognizance de Droit tantum. 2 Com. 353.

§ 17. A fine *ſur cognizance de droit tantum*, or upon acknowledgment of the right only, without the circumſtance of a preceding gift by the cognizor. This ſpecies of fine is generally uſed to paſs a reverſionary intereſt, which is in the cognizor; for of ſuch reverſions there can be no feoffment or donation with livery ſuppoſed, as the freehold and poſſeſſion during the particular eſtate is veſted in a third perſon.

Co. Read. 3.

This fine may alſo be uſed by a tenant for life, in order to make a ſurrender of his life eſtate to the perſon in remainder or reverſion; and it is then called a fine upon ſurrender.

§ 18. The form of it is; "And the agreement is "ſuch, to wit, that the aforeſaid *A.* hath acknow- "ledged the aforeſaid tenements, *&c.* to be the right "of the ſaid *B.*, and he hath granted for himſelf and "his heirs, that the aforeſaid tenements which *W. R.* "and *M.* his wife hold for the term of the life of the "ſaid *G.* of the inheritance of the ſaid *A.* on the day "on which this agreement was made, and which, "after

"after the deceaſe of him the ſaid *G.*, ought to re-
"vert to the ſaid *A.* and his heirs, ſhall, after the de-
"ceaſe of the ſaid *G.*, entirely remain to the ſaid *B.*
"and his heirs for ever."

§ 19. This fine is executory, and paſſes a fee-ſimple without the word *heirs*. It ſeems to have been the moſt ancient ſpecies of fine; for the demandant was obliged to follow the rules of law, and ſue out a writ of poſſeſſion: but when it became uſual to procure a feoffment of the lands firſt, a writ of poſſeſſion was unneceſſary, which probably gave riſe to fines *ſur cognizance de droit come ceo*. 1 Inſt. 9 *b*.

§ 20. If there be a tenant for life, remainder for life, and the firſt tenant for life levies a fine to the perſon in remainder, *ſur cognizance de droit tantum*, it will operate merely as a ſurrender of his eſtate for life; becauſe, by this fine, the tenant for life only acknowledges all the right which he had in the lands to belong to the perſon in remainder. But if, in this caſe, the tenant for life had levied a fine *ſur cognizance de droit come ceo, &c.* it would create a forfeiture of both their eſtates, and the perſon in reverſion might enter immediately; becauſe a fine *ſur cognizance de droit come ceo, &c.* is always ſuppoſed to paſs an eſtate in fee-ſimple, unleſs the contrary is expreſsly mentioned; whereas a fine *ſur cognizance de droit tantum* only conveys all the right which the cognizor has, and no more. Co. Read. 3. Vide infra, ch. 12.

Fines ſur Conceſſit. 2 Com. 353.

§ 21. A fine *ſur conceſſit* is, where the cognizor, in order to make an end of diſputes, though he acknowledges no precedent right or gift, grants to the cognizee an eſtate *de novo*, by way of ſuppoſed compoſition, which may be either an eſtate in fee, in tail, for life, or even for years.

The form of this fine is; "And the agreement is "ſuch, to wit, that the aforeſaid *A.* hath granted to "the aforeſaid *B.* the aforeſaid tenements, *&c.* to hold "for 61 years." It is executory.

Fines ſur Done Grant & Render. 2 Com. 353.

§ 22. A fine *ſur done grant et render* is a double fine, comprehending the fine *ſur cognizance de droit come ceo*, and the fine *ſur conceſſit*. It is uſed in order to create particular limitations of eſtates; whereas the fine *ſur cognizance de droit come ceo* conveys nothing but an abſolute eſtate, either of inheritance, or at leaſt of freehold.

In this fine the cognizee, after the right is acknowto be in him, renders or grants back to the cognizor ſome other eſtate in the lands.

§ 23. The form of this fine is; "And the agree-"ment is ſuch, to wit, that the aforeſaid *A.* hath ac-"knowledged the aforeſaid tenements to be the right "of him the ſaid *B.* as thoſe which the ſaid *B.* hath "of the gift of the aforeſaid *A.* and thoſe he hath "remiſed and quit-claimed from himſelf the ſaid *A.* "and his heirs for ever, (warranty from the cognizor): "and for this acknowledgment, remiſe, quit-claim,

"warranty,

" warranty, fine, and agreement, the ſaid *B.* hath " granted to the ſaid *A.* the aforeſaid tenements, *&c.* " and this he hath rendered to him, in the ſame court " to hold the ſaid tenements, *&c.* to the ſaid *A.* and " the heirs of his body."

§ 24. In a fine of this ſort, the render muſt be made of the lands demanded in the original writ, or of ſomething iſſuing out of thoſe lands. Thus, if the cognizance be made of the manor of *Dale*, the cognizee cannot make a render of the manor of *Sale*; or if the cognizance be made of the third part of a manor, the render cannot be of the whole manor, becauſe the court can only determine the right of that about which the parties contended, and which was demanded in the original writ: but if the cognizor acknowledges all his right in the lands to be in the cognizee, and the cognizee, in return, grants and renders to the cognizor a particular eſtate in the lands, or a rent or common out of it, the render is good, becauſe the determination entirely refers to the things in diſpute, one party taking the ultimate property in the land, and the other a particular eſtate in it; all which is comprehended in the original writ.

Co. Read. 11. 2 Roll. Ab. 15, 16.

§ 25. It follows from the ſame principle, that the lands muſt be rendered in the firſt inſtance to ſome perſon named in the original writ; but an eſtate may be rendered to a perſon not named in the original writ by way of remainder, as well as in any other kind of concord.

Co. Read. 6.

§ 26. A fine *ſur done grant & render* is executed as to the firſt part, and executory as to the ſecond; for if the firſt part was not executed, it would be void, as the cognizee can have nothing to render to the cognizor until he is in poſſeſſion.

Shep. Tou. 18.

§ 27. This ſpecies of fine being generally uſed to create particular limitations of eſtates, is conſtrued rather as a private deed or conveyance, than as a judgment in an adverſary ſuit; and therefore it need not have ſuch a preciſe form as other fines.

Tey's Caſe, 5 Rep. 38.

§ 28. Huſband and wife levied a fine to *A.* and *B.* and the heirs of *A.* of the manor of *Layer de la Hay*, *Layer Britton*, and ſeveral other manors, and a great number of acres of land, meadow, paſture, &c. in *Layer de la Hay*, *Layer Britton*, &c. and in this fine ſeveral grants and renders were made. In the third render the manors of *Layer de la Hay*, and *Layer Britton*, *et tenementa prædicta* in *Layer de la Hay* and *Layer Britton*, were granted and rendered to the huſband and wife, and to the heirs of the huſband, and by the fourth render 115 acres of land in *Layer Britton* were granted and rendered to the wife in tail.

After the death of the huſband, his brother and heir brought a writ of error, and aſſigned for error the repugnancy between the third and fourth render, for, by the third render all the lands in *Layer Britton* were granted to the huſband and wife, and to the heirs of the huſband; and, by the fourth render, part of the ſame tenements were granted to the wife in tail;

tail; ſo that the ſame lands were granted to two different perſons, which was repugnant and erroneous. It was obſerved, that a fine was of the ſame nature as a judgment, and as *Bracton* ſays, *Oportet ut res certa deducatur in judicium.* But the court reſolved, that the fourth render, as to that which was contained in the third render, ſhould be of the ſame condition and quality in conſtruction, as a charter or other conveyance between party and party, and need not have ſuch a preciſe form as a writ or judgment, and therefore that the fourth render was good, and ſhould invalidate the third tender as to the 115 acres.

§ 29. If lands be rendered by fine to a perſon and his heirs, the lands are thereby immediately bound; and although the perſon to whom the render is made dies before execution, yet his heirs will have the lands; for the fine having been levied in the life-time of the parties, the lands were ſo bound by it, that it could not be altered. 1 Rep. 156 *a.*

TITLE XXXV.

FINE.

CHAP. IV.

In what Courts Fines may be levied, and before whom acknowledged.

§ 3. *Court of Common Pleas.*
7. *Of the County Palatine of Lancaſter.*
8. *Of the County Palatine of Cheſter.*
9. *Of the County of the City of Cheſter.*
10. *Of the County Palatine of Durham.*
12. *Of the Great Seſſions of Wales.*
14. *Of the Iſle of Ely.*
15. *Courts of Antient Demeſne.*
17. *Courts of Cities and Corporate Towns.*
19. *Before whom Fines may be acknowledged.*
20. *Commiſſioners under a Writ of* Dedimus Poteſtatem.
25. *Judges of Aſſize.*
26. *How the Acknowledgment is to be certified.*
36. *Rules reſpecting the taking of Fines by* Dedimus.
41. *Lord Chief Juſtice of the Common Pleas.*
42. *Juſtices of Wales.*

Section 1.

A FINE being a compoſition of a ſuit commenced for the recovery of real property, it might originally have been levied in any court which had juriſdiction to hold pleas of land: and accordingly it appears that, in the early ages of the law, when courts were more numerous, and their juriſdiction more extenſive than at preſent, fines were frequently levied in the Lord's Court, the Hundred Court, and the County Court; and in *Dugdale's Origines Juridiciales* 92. there is a record of a fine which was levied in the county

Gilb. Ten. 1 0.
Hale's Hiſt, 151.
Vide 3 Rep. Preface.

county court of *Nottingham* in the reign of King *John.*

Fines were alſo levied in all the courts at *Weſtminſter*, and even before the King himſelf, as appears from a great number of records which have been publiſhed in *Spelman*'s Gloſſary, and by *Dugdale* and *Maddox.* Dugd. Orig. Jur. 50. 92. Maddox Form. Ang. N° 364. 4 Inſt. 75. Maddox Exch. 145.

§ 2. From the time of the appointment of Juſtices in Eyre by *Hen.* 2. fines were uſually levied before them, on account of the pre-eminence of their court over the county courts; and *Maddox* has preſerved ſeveral concords of fines which are expreſſed to have been levied, *coram abbate de* Eveſhaam *Johanne de Munmul, &c. Juſticiariis itinerantibus.* Glanv. lib. 8. c. 5. N° 365, 366. 367. 369. 372. Roll. Ab. Tit. Fine (C).

§ 3. In conſequence of the fixed reſidence of the Court of Common Pleas at *Weſtminſter* by *Magna Charta*, fines were thenceforth uſually levied in that court, becauſe therein only could real actions be commenced; however, if a record was removed by a writ of error from the Court of Common Pleas into the Court of King's Bench, a compoſition of the ſuit might take place there, by which means a fine might be levied in that court. Court of Common Pleas. 4 Inſt. 99. Denſhall Read. on Fines 3.

§ 4. It is enacted by the ſtatute *de modo levandi fines*, that fines ſhall be levied in the Court of Common Pleas, or before Juſtices in Eyre, and not elſewhere, and that a fine ſhall not be levied unleſs all the juſtices are preſent. But Lord *Coke* ſays, that 2 Inſt. 515.

Co. Read. 8. that the latter part of this ſtatute was repealed by implication by the ſtatute 4 *Hen.* 7. ſo that now a fine levied in the Court of Common Pleas before two juſtices is conſidered to be equally valid, as if all the Judges were preſent.

2 Inſt. 514. Co. Read. 8. § 5. An opinion is advanced by Lord *Coke* that a fine cannot now be levied ſo as to have the force of a final concord in any court but the Common Pleas; and therefore that the King cannot now, in contradiction to this negative ſtatute, grant a power to hold pleas for the purpoſe of levying fines. He ſeems alſo, to have been of opinion, that ſince this ſtatute, fines cannot be levied in any inferior court, unleſs the privilege of holding ſuch court has been confirmed by act of parliament; but this is certainly a miſtake, for fines may ſtill be levied in inferior courts, as will be ſhewn in a ſubſequent part of this chapter.

§ 6. The counties palatine of *Lancaſter*, *Cheſter*, and *Durham*, having private courts of their own, the King's ordinary writs do not run there, ſo that fines could not be levied in the Court of Common Pleas at *Weſtminſter* of lands ſituated in thoſe counties, but this defect has been remedied by the following ſtatutes.

Of the County Palatine of Lancaſter. § 7. By the ſtatute 37 *Hen.* 8. it is enacted, that all fines levied before the juſtices of the county palatine of *Lancaſter*, commonly called Juſtices of Aſſize at *Lancaſter*, or before one of them, of any lands, tenements, or other hereditaments lying or being within

within the ſaid county palatine of *Lancaſter*, which ſhall be openly read and proclaimed three ſeveral days in open ſeſſions, in the preſence of the Juſtices of Aſſize at *Lancaſter*, or one of them for the time being; and alſo that ſhall be openly proclaimed in the ſame manner at the two next general ſeſſions that ſhall be holden in the ſaid county palatine of *Lancaſter*, at three ſeveral days in either of the ſaid two ſeſſions, after ſuch manner and form as is commonly uſed in the Court of Common Pleas at *Weſtminſter*, ſhall be of like force, ſtrength and effect in law, to all intents, effects, conſtructions and purpoſes, as fines levied in the Court of Common Pleas.

Of the County Palatine of Cheſter.

§ 8. By the ſtatute 2 & 3 *Ed.* 6. c. 28. it is enacted, That all fines levied or acknowledged before the high Juſtice of the county palatine of *Cheſter*, or before the Deputy or Lieutenant Juſtice there, of any lands, tenements, or other hereditaments, lying or being within the ſaid county palatine of *Cheſter*, which ſhall be openly read and proclaimed three ſeveral days in the open ſeſſions, in the preſence of the Juſtice of the ſaid county palatine of *Cheſter*, or before the Deputy or Lieutenant Juſtice there, at the ſame ſeſſions, that the ſame fine ſhall be engroſſed, and alſo that it ſhall be openly read and proclaimed in the ſame manner, at the two next general ſeſſions that ſhall be holden in the ſaid county palatine of *Cheſter*, next after the levying and engroſſing ſuch fine, at three ſeveral days in either of the ſaid two ſeſſions, after ſuch manner and form as is commonly uſed in the King's Court of Common Pleas at *Weſtminſter*, ſhall be of like force, ſtrength

ſtrength and effect in law, to all intents, effects, conſtructions and purpoſes, as fines duly levied with proclamations before the King's Juſtices of his Common Pleas.

Of the County of the City of Cheſter.

§ 9. By the ſtatute 43 *Eliz.* c. 15. § 3. it is enacted, that it ſhall and may be lawful to and for all perſons, upon any original writ or writs of covenant, or any other original writ or writs, whereupon fines have been uſually levied, to be purchaſed out of the Court of Exchequer within the ſaid county palatine of *Cheſter*, returnable before the Mayor of the ſaid city, in the Portmoot Court to be holden within the ſaid city, to levy any fine or fines of any lands, tenements, or hereditaments, lying or being within the ſaid county of the ſaid city of *Cheſter*, before the Mayor of the ſaid city, in the ſaid Portmoot Court, in ſuch manner and form as fines may be levied before the high Juſtice of the county palatine of *Cheſter*; and that the Mayor of the ſaid city ſhall have full power and authority to receive and record all and every ſuch fine and fines, and that all and every ſuch fine or fines which ſhall be ſo levied, and which ſhall be openly read and proclaimed before the Mayor of the ſaid city, in the ſaid Portmoot Court, once at the ſame court day that the ſaid fine ſhall be ingroſſed, and once at every of the nine next court days of Portmoot, next after the levying and ingroſſing of ſuch fine, ſhall be of like force, ſtrength, and effect in law, to all intents, conſtructions, and purpoſes, as fines duly levied with proclamations before the ſaid high Juſtice of *Cheſter*.

And

And by § 5. of the ſame ſtatute it is enacted, That upon all ſuch original writs, to be purchaſed out of the ſaid Court of Exchequer aforeſaid, for the levying of any fine or fines within the ſaid city of *Cheſter*, the Mayor of the ſaid city for the time being ſhall have full power and authority to award and ſend forth ſuch like writ or writs, proceſs or precepts of *dedimus poteſtatem* to any two or more ſufficient perſons, authoriſing them to receive, and take the acknowledgment of ſuch perſon or perſons as ſhall be willing to levy ſuch fine or fines, and by reaſon of ſickneſs or other reaſonable impediment cannot come in perſon before the ſaid Mayor to make ſuch acknowledgment.

Of the County Palatine of Durham.

§ 10. By the ſtatute 5 *Eliz.* c. 27. it is enacted, that all fines levied before the Juſtice or Juſtices of the county palatine of *Durham*, for the time being authoriſed for that purpoſe, of any lands, tenements, or other hereditaments, lying or being within the ſaid county palatine of *Durham*, which ſhall be openly read and proclaimed two ſeveral days in the open ſeſſions, in the preſence of the Juſtices of Aſſiſe at *Durham*, or one of them at the ſame ſeſſions, that the ſame fine ſhall be ingroſſed, and alſo that ſhall be openly read and proclaimed in the ſame manner, at the two next general ſeſſions that ſhall be holden in the county palatine of *Durham*, next after the levying or ingroſſing of ſuch fine, ſhall be of the ſame force, ſtrength, and effect in law, to all intents and purpoſes, as fines duly levied with proclamations before the Queen's Juſtices of the Common Pleas at *Weſtminſter*.

1 Wilf. Rep. 275.

§ 11. If a fine is found by verdict to have been levied before the Juſtices of the county palatine of *Lancaſter*, without finding who thoſe Juſtices were, and whether they had power to take fines or not; the court will preſume them to be ſuch Juſtices as had power by ſtatute to take fines in the county palatine of *Lancaſter*, if the contrary does not appear.

Of Great Seſſions in Wales.

§ 12. Upon the reduction of *Wales*, courts of juſtice were erected there, in which all pleas of real and perſonal actions were to be held, and fines of lands ſituated there are levied in thoſe courts under the authority of the ſtatute 34 & 35 *Hen.* 8. c. 26. § 40. by which it is enacted, that all fines levied before the Juſtices of *Wales*, of lands, tenements, and hereditaments, ſituated within their juriſdiction, with proclamation made the ſame ſeſſion, that the ſaid fine ſhall be ingroſſed, and in two other great ſeſſions, then next to be holden within the ſame county, ſhall be of the ſame force and ſtrength to all purpoſes as fines levied with proclamations be of, that be levied before the Juſtices of the Common Pleas in *England*.

Ch. 2.

§ 13. By the ſtatute 27 *Eliz.* c. 9. all the clauſes in the 23 *Eliz.* c. 3. are extended to fines levied in the courts of great ſeſſions in *Wales*, and alſo in the courts of the counties palatine of *Lancaſter*, *Cheſter*, and *Durham*.

Of the Iſle of Ely. 4 Inſt. 220.

§ 14. The Iſle of *Ely* is a royal franchiſe, the Biſhop having, by a grant from *Hen.* 1. *jura regalia*, whereby he exerciſes both a civil and criminal juriſdiction;

diction; and therefore fines are levied in a court held by the Biſhop's Juſtices, of lands ſituated within the franchiſe.

§ 15. The tenure of ancient demeſne being a ſpecies of privileged villenage, the tenants thereof could not ſue or be ſued for their lands in the King's Courts of common law; but had the privilege of having juſtice adminiſtered to them in the court of the manor, by *petit* writ of *droit cloſe*, directed to the bailiffs of the King's manors, or to the Lord of the Manor, whereof the lands were held.

Courts of Ancient Demeſne. Black. Tra. 4to. 218. 231.

In conſequence of this principle, no fine can be levied in the Court of Common Pleas, of lands held in ancient demeſne, for that would be a wrong to the lord of whom the lands were holden; as they would by that means become frank free, and not impleadable in his court: but as ſuch tenants were allowed to commence actions in the court of the manor, they were alſo permitted to compound their ſuits there, by which means fines have at all times been levied of lands held in ancient demeſne upon little writs of right cloſe in the court of the manor.

2 Inſt. 513.

§ 16. It was found by ſpecial verdict that the lands in queſtion were held of the manor of *Wormelow*, which is *de antiquo dominico coronæ domini regis et anteceſſorum ſuorum*, impleadable in the court of the manor *per parvum breve de recto clauſo corum ſeneſchallo ſectatoribus et domeſmen ejuſdem manerii, ſive eorum locum tenens et attornat:* and that upon writs of

Hunt v. Bourne, Salk. 339. Com. Rep. 93. 124.

right cloſe fines had been time out of mind levied and leviable in the ſame court. That *Thomas Guillym* was ſeiſed in tail of the ſaid lands, and being ſo ſeiſed, 22 *Car.* 1. a fine was levied in the ſaid court *ſecundum conſuetud. prædict.* before *A. B. locum tenent. Willielmi Kyrle ſeneſchalli et R. attornat. J. S. & W. attornat. J. N. ad tunc ſectator. et domeſmen ejuſdem curiæ.* Then the fine was ſet forth, and it appeared to have been levied before the attornies of the ſuitors in *placito conventionis ſecundum conſuetudinem manerii, come ceo qu'il a de ſon done.*

It was determined by Lord Chief Juſtice *Holt*, and the other Judges, that a fine might be levied of lands held in ancient demeſne in the court of the manor, though it is not a court of record, becauſe it is but agreeable to the power of that court in other inſtances, for they may proceed to try the miſe joined in a writ of right cloſe, which is of a higher nature than a fine; whereas in all other inferior courts, on the miſe joined, the cauſe muſt be removed into the Common Pleas by *recordari;* and the ſtatute 18 *Ed.* 1. *de modo levandi fines* is but declaratory of the common law, and was made to rectify a miſtake, that fines were leviable in inferior courts upon bills or plaints, which cannot now be either by grant or cuſtom, by reaſon of the negative words of that ſtatute. But this does not extend to courts of ancient demeſne, for then the ſtatute 18 *Ed.* 1. would make fines of thoſe lands leviable in the Court of Common Pleas, which is not the caſe, ſuch fines being reverſible by the lord, ſo that tenants in ancient demeſne would be under

Dyer 111 *b.*

Fitz. N. B. 12.

under a double disadvantage, for a fine could not be levied of their lands in any court.

This judgment was affirmed by the House of Lords. 4 Bro. Ca. in Parl. 66.

§ 17. Fines may be levied in the courts of cities and corporate towns by custom, where such courts have power to hold pleas of land. Courts of Cities and corporate Towns.

Maddox has published a record of a fine levied in the town court of the city of *Coventry*, before the mayor and bailiffs of that town; and also a fine levied in the court of *Fordwick*, to which King *Henry* 8. was a party. Form. Angl. N° 379. 394.

§ 18. A fine of this kind is however void, and may be reversed unless it appears that the court had a power of taking fines.

In a writ of error to reverse a fine levied in *Shrewsbury* before the bailiffs, the first error assigned was, that it did not appear they had any authority to take fines, and they could not have it by prescription, or by general words in the King's grant. The court said the fine was void, it not appearing by what authority the fine was levied; for it was in derogation of the Crown and of the profits of the Crown *pro licentia concordandi*. Waring v. Whale, Eliz. 314. S. P. 1 Leon. 188.

§ 19. With respect to the persons before whom fines may be acknowledged, it appears that originally those who were desirous of levying fines, acknowledged Before whom Fines may be acknowledged.

ledged the concord in open court, and fines are ſtill frequently acknowledged in the ſame manner, the parties appearing at the Bar of the Court of Common Pleas: but fines may alſo be acknowledged out of court.

Commiſſioners under a Writ of Dedimus Poteſtatem.

§ 20. It appears from *Glanville*, *lib.* 11. c. 1. that the ſuitors in the *curia regis* were at all times allowed to proſecute their cauſes by attorney, who was called *reſponſalis ad lucrandum vel perdendum;* and a plea might be thus commenced and determined, whether by judgment, or by final concord, as effectually as by the principal himſelf. *Per procuratorem itaque talem poteſt placitum illud deduci in curia et terminari, ſive per judicium, ſive finalem concordiam, adeo plene et firmiter ut per eum qui alium loco ſuo inde poſuit.*

No. 369. 362.

In conſequence of this rule, fines were frequently levied by attorney; and in the *Formulare Anglicanum* there are ſeveral records of fines, which appear to have been levied by attorney, the chirograph being worded in this manner—*Hæc eſt finalis concordia facta, &c. inter Thomam de Preſton per Alexandrum Wallenſem, poſitum loco ſuo ad lucrandum vel perdendum, et Ranulphum, &c.* This practice was productive of ſeveral frauds*, and, therefore, the ſtatute *de modo levandi*

* There is an inſtance in the rolls of parliament 18 *Edw.* 1. No. 9. vol. 1. p. 22. where a perſon complains, that having demiſed certain lands to another for twelve years, and agreed to levy a fine to confirm the demiſe, he appointed a friend of the leſſee's as his attorney for that purpoſe, who acknowledged a fine of other lands to

levandi fines enacted, that the parties to a fine ſhould appear perſonally in court, that the judges might have an opportunity of examining into their age and capacity.

§ 21. The great inconvenience of compelling old and infirm perſons to travel from the moſt remote parts of the kingdom to *Weſtminſter*, produced a regulation which is uſually called the ſtatute of *Carliſle*, but which, in fact, is a writ addreſſed by *Edw.* 2. to the judges, for their government in taking the acknowledgment of fines. It ordains, that all parties who would acknowledge or render their rights or tenements to another by fine, ſhould appear perſonally before the juſtices, ſo that their age, idiocy, or any other defect might be judged of by them. " Provided notwithſtanding, that if any perſon be by age or impotence " decrepit, or by caſualty ſo oppreſſed and withholden, " that by no means he is able to come before you in " our court, then in ſuch caſe we will that two or " more of you by aſſent of the reſidue of the bench, " ſhall go unto the party ſo diſeaſed, and ſhall receive " his cognizance upon that plea and form of plea that " he hath in our court, whereupon the ſame fine ought. 15 Edw. 2. 2 Inſt 512.

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the leſſee and his heirs for ever, *et idem Matheus poſtea tuliſſet quoddam breve de conventione verſus ipſum Willelmum de prædicto termino affirmando, prout idem Matthæus fecit ipſum Willelmum quendam attornatum facere, ad finem illum levandum coram juſticiariis de Banco; prædictus Matthæus tamen fecit et procuravit erga attornatum illum qui fuit de notitia et amicitia ſua, quod idem attornatus recognovit alia tenementa quæ fuerunt ipſius Willelmi, et in ſcripto inter eos confecto non contenta, &c.*

Co. Read. 8. that the latter part of this ſtatute was repealed by implication by the ſtatute 4 *Hen.* 7. ſo that now a fine levied in the Court of Common Pleas before two juſtices is conſidered to be equally valid, as if all the Judges were preſent.

2 Inſt. 514. Co. Read. 8. § 5. An opinion is advanced by Lord *Coke* that a fine cannot now be levied ſo as to have the force of a final concord in any court but the Common Pleas; and therefore that the King cannot now, in contradiction to this negative ſtatute, grant a power to hold pleas for the purpoſe of levying fines. He ſeems alſo, to have been of opinion, that ſince this ſtatute, fines cannot be levied in any inferior court, unleſs the privilege of holding ſuch court has been confirmed by act of parliament; but this is certainly a miſtake, for fines may ſtill be levied in inferior courts, as will be ſhewn in a ſubſequent part of this chapter.

§ 6. The counties palatine of *Lancaſter*, *Cheſter*, and *Durham*, having private courts of their own, the King's ordinary writs do not run there, ſo that fines could not be levied in the Court of Common Pleas at *Weſtminſter* of lands ſituated in thoſe counties, but this defect has been remedied by the following ſtatutes.

Of the County Palatine of Lancaſter. § 7. By the ſtatute 37 *Hen.* 8. it is enacted, that all fines levied before the juſtices of the county palatine of *Lancaſter*, commonly called Juſtices of Aſſize at *Lancaſter*, or before one of them, of any lands, tenements, or other hereditaments lying or being within

within the ſaid county palatine of *Lancaſter*, which ſhall be openly read and proclaimed three ſeveral days in open ſeſſions, in the preſence of the Juſtices of Aſſize at *Lancaſter*, or one of them for the time being; and alſo that ſhall be openly proclaimed in the ſame manner at the two next general ſeſſions that ſhall be holden in the ſaid county palatine of *Lancaſter*, at three ſeveral days in either of the ſaid two ſeſſions, after ſuch manner and form as is commonly uſed in the Court of Common Pleas at *Weſtminſter*, ſhall be of like force, ſtrength and effect in law, to all intents, effects, conſtructions and purpoſes, as fines levied in the Court of Common Pleas.

Of the County Palatine of Cheſter.

§ 8. By the ſtatute 2 & 3 *Ed.* 6. c. 28. it is enacted, That all fines levied or acknowledged before the high Juſtice of the county palatine of *Cheſter*, or before the Deputy or Lieutenant Juſtice there, of any lands, tenements, or other hereditaments, lying or being within the ſaid county palatine of *Cheſter*, which ſhall be openly read and proclaimed three ſeveral days in the open ſeſſions, in the preſence of the Juſtice of the ſaid county palatine of *Cheſter*, or before the Deputy or Lieutenant Juſtice there, at the ſame ſeſſions, that the ſame fine ſhall be engroſſed, and alſo that it ſhall be openly read and proclaimed in the ſame manner, at the two next general ſeſſions that ſhall be holden in the ſaid county palatine of *Cheſter*, next after the levying and engroſſing ſuch fine, at three ſeveral days in either of the ſaid two ſeſſions, after ſuch manner and form as is commonly uſed in the King's Court of Common Pleas at *Weſtminſter*, ſhall be of like force, ſtrength

that the commiſſioners taking the ſame are, to the beſt of the deponent's information and belief, either barriſters of five years ſtanding, or ſolicitors in ſome of the courts in *Weſtminſter-Hall*, the judges of the Court of Seſſion and Exchequer, or advocates and clerks to the ſignet of five years ſtanding in *Scotland*.

Judges of Aſſize. Jenk. 227. Dyer 224 *b*.

§ 25. The judges of aſſize may, in their circuits *per conſuetudinem regni*, take the acknowledgment of fines without any writ of *dedimus poteſtatem*, on account of the great confidence which the law places in their judgment and integrity *: in ſuch caſes, however, a writ of *dedimus poteſtatem* ought to be ſued out, bearing date before the acknowledgment of the fine; although, if the writ of *dedimus poteſtatem* is teſted after the date of the acknowledgment, ſtill the fine will be ſupported.

Argenton v. Weſtover, Cro. Eliz. 275.

§ 26. A writ of error was brought to reverſe a fine, and the error aſſigned was, that it appeared upon record that the acknowledgment of the fine was taken by Chief Baron *Manwood*, on the 27th of *March*, and the writ of covenant and *dedimus poteſtatem* were teſted on the 9th of *April*, ſo that the acknowledgment was taken without any authority; and by the ſtatute 23 *Eliz.* the day of the acknowledgment ought always to be certified; but the court over-ruled this objec-

* There is a petition in the rolls of parliament 28 *Edw.* 3. No. 26. vol. 2. p. 261. from the commons beyond *Trent*, praying that a juſtice of one or the other bench ſhould come twice each year into their counties, to take the acknowledgment of fines.

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tion, ſaying it was good enough, and that otherwiſe they ſhould reverſe many fines.

§ 27. The commiſſioners appointed by writ of *dedimus poteſtatem* are directed by the ſtatute 23 *Eliz.* c. 23. ſ. 5. to certify the acknowledgment of the fine within twelve months after it is taken, and alſo to certify the year and day whereon the ſame was acknowledged. How the acknowledgment is to be certified.

If the commiſſioners, in a writ of *dedimus poteſtatem*, refuſe to certify the acknowledgment of a fine purſuant to this ſtatute, within twelve months, a *certiorari* may be awarded againſt them, reciting the ſubſtance of the writ of *dedimus poteſtatem*, and the acknowledgment of the fine, commanding them to certify it; and in caſe of their refuſal, an *alia*, a *pluries*, and an *attachment*, will iſſue againſt them. Fitz. N. B. 146.

§ 28. If the commiſſioners die before they have certified the acknowledgment of a fine, their executors muſt certify it upon a *certiorari*; and, in caſe of their refuſal, the ſame proceſs lies againſt them as againſt the commiſſioners. Idem.

§ 29. If a writ of *dedimus poteſtatem* be directed to two perſons jointly, and only one of them takes the acknowledgment of the fine, it will be erroneous. Downes v. Savage. Cro. Eliz. 240.

§ 30. If a perſon has ſeveral writs of covenant depending againſt ſeveral perſons in different counties, he may have a writ of *dedimus poteſtatem* directed to commiſſioners to take their acknowledgments ſeverally. Fitz. N. B. 327.

Anon. Cro. Eliz. 576.

§ 31. A writ of *dedimus poteſtatem* was awarded to take the acknowledgment of four perſons to the ſame fine. The commiſſioners returned the acknowledgment of three of the perſons only. The court reſolved that the fine ſhould paſs as againſt the three perſons who had acknowledged it; and that the name of the fourth perſon ſhould be eraſed out of the writ of covenant and *dedimus poteſtatem.*

It was reſolved in the ſame caſe, that if a writ of *dedimus poteſtatem* be awarded to take the acknowledgment of three perſons to the ſame fine, the commiſſioners need not take the acknowledgment of all the three perſons at the ſame time, but may take the acknowledgment of one of them at one time, and of another of them at another time.

§ 32. A fine will not be reverſed for any trifling error or miſtake in the return made by commiſſioners under a writ of *dedimus poteſtatem.*

Earl of Bedford v. Forſter, Cro. Jac. 87.

A writ of error was brought to reverſe a fine taken by commiſſioners, becauſe, upon the back of the writ of *dedimus poteſtatem*, it was *executio iſtius brevis patet in quodam panello huic brevi adnexo*, whereas it ought to have been *in quadam ſchedula huic brevi annexa.* But all the court held it was but matter of form, and not material; for, although it be not properly ſaid to be a pannel, yet a pannel and ſchedule are all one in ſubſtance, and no cauſe to reverſe the fine.

§ 33. The

§ 33. The writ of *dedimus poteſtatem* recites, that a writ of covenant is depending between the parties, and, therefore, ſhould bear date after the writ of covenant. Shep. Tou. 5, Co. Read. 9. 1 Roll. Rep. 223.

A writ of error was brought to reverſe a fine levied at *Cheſter*, becauſe the *teſte* of the writ of *dedimus poteſtatem* was prior to the writ of covenant; and it was held to be a manifeſt error. Goburn v. Wright, Cro. Eliz. 740. Herbert v. Binion, 1 Roll. Ab. 794.

34. But if the writ of *dedimus poteſtatem* be teſted on the ſame day with the writ of covenant, the fine will be valid.

A writ of error was brought to reverſe a fine, becauſe the writ of *dedimus poteſtatem* was teſted on the ſame day with the writ of covenant, which was contended to be erroneous, becauſe the writ of *dedimus poteſtatem* recites, that the writ of covenant is depending; whereas the writ of covenant could not be ſaid to be depending until its return. But the court were of opinion that this was no error, for the writ of covenant may be ſaid to be depending immediately on the purchaſe of it; and if a ſtranger ſhould buy the lands before the return of the writ of covenant, it would be champerty. Arundel v. Arundel, Cro. Eliz. 677. Cro. Jac. 11. 5 Rep. 47 *b.*

§ 35. It is the duty of all thoſe who are appointed commiſſioners in a writ of *dedimus poteſtatem*, to inform themſelves by means of ſome people of credit, that the perſons who acknowledge a fine before them, are really the parties named in the original writ. They ſhould alſo be extremely attentive in examining whether

ther there be any married woman, infant, idiot, or lunatic, among the parties to the fine, as they are liable to be ſeverely puniſhed by the Court of Common Pleas for any fraud or wilful neglect in the execution of the truſt repoſed in them by that court.

Petty's Caſe. 1 Freem. 78.

Rules of Court reſpecting the taking of Fines by Dedimus. Wilſon 82. Vide Dean v. Tidmarſh, Barnes 143.

§ 36. By a rule of the Court of Common Pleas made in *Hil.* 13 *Geo.* 1. it was directed, that no fine acknowledged before commiſſioners ſhould be allowed to paſs, unleſs ſome perſon who was preſent when the fine was acknowledged, ſhould appear perſonally before the Lord Chief Juſtice of the court, and be examined upon oath touching the execution thereof.

This rule having been found, by experience, to be attended with inconveniencies, and not having anſwered the good purpoſes for which it was intended, the court made the following rules:

Wilſon 85.

Hilary 17 *Geo.* 2. "It is ordered, that inſtead of an "oath made *viva voce* of the due acknowledgment of "fines, an affidavit in writing on parchment ſhall be "made and annexed to every fine, in which the perſon "making the ſame ſhall ſwear that he knew the parties "acknowledging ſuch fine; that the ſame was duly "ſigned and acknowledged; that the party or parties "acknowledging, and alſo the commiſſioners taking "the ſame, were of full age and competent under-"ſtanding; that the feme-coverts (if any) were ſolely "and ſeparately examined apart from their huſbands, "and freely and voluntarily conſented to acknowledge "the

" the ſame; and that the cognizor or cognizors, and " every of them, knew the ſame to be a fine to paſs " his, her, or their eſtate or eſtates; which fine, to- " gether with ſuch affidavit annexed, ſhall be tranſ- " mitted to the Lord Chief Juſtice, or ſome other juſ- " tice of this court, for his *allocatur* thereon, and " ſuch affidavit ſhall remain annexed to ſuch fine, and " be left with the ſame in the proper office: and it is " ordered that every ſuch affidavit, except where the " perſons, at the time of their acknowledging the fine, " are in *Ireland*, or ſome other parts beyond the ſeas, " ſhall be made by ſome attorney of the courts of " *Weſtminſter-Hall.*"

Hilary 26 & 27 *Geo.* 2. " It is ordered, that in the " affidavits made in purſuance of the preceding rule, " the perſon or perſons ſo making the ſame ſhall ſwear, " that the fine was duly ſigned and acknowledged " upon the day and year mentioned in the caption; " and if there be any razure or interlineation in the " body or caption of ſuch fine, that ſuch razure or " interlineation was made before the party or parties " ſigned the ſaid fine, and before the caption was ſigned " by the commiſſioners." Wilſon 89.

§ 37. The Court of Common Pleas has, in ſome inſtances, diſpenſed with theſe rules.

A fine was taken before *Prentice* an attorney, and *Prentice* a tradeſman, as commiſſioners; *Prentice* the attorney died without making the proper affidavit of the Say v. Smith, Barnes 217.

the acknowledgment of the fine. One of the cognizors became a bankrupt, abſconded, and did not ſurrender within the 42 days, as required by the ſtatute. The fine was ordered to paſs, on an affidavit of the due acknowledgment of it by *Prentice* the tradeſman, notwithſtanding the general rule requiring ſuch affidavits to be made by attornies.

§ 38. Where fines have been acknowledged out of the kingdom, the judges have alſo remitted the ſtrictneſs of theſe rules.

Fleetwood v. Calenda, Barnes 219.

The Lord Chief Juſtice, aſſiſted by Mr. Juſtice *Clive*, made an order, that a fine ſhould paſs as to two of the cognizors, conſidering the particular circumſtances of the caſe, notwithſtanding the ſame was not ſigned by them. One of the commiſſioners attended and made oath, that this fine was duly acknowledged before him and another commiſſioner, by the cognizors at *Naples* in *Italy*; that the parties were of full age and good underſtanding; that the married woman was examined apart from her huſband, and freely conſented. The fine being taken from perſons beyond ſeas, it was not within the order of the court, requiring an affidavit; and the ſigning of a fine by the cognizors is not abſolutely neceſſary.

Heathcock v. Hanbury, Barnes 217.

§ 39. Two fines taken at *Hamburgh*, where the cognizors reſided, were ordered to paſs by all the four judges, upon an affidavit by a commiſſioner, of the due execution of each fine ſworn before a clerk in

in the chancery of the city of *Hamburgh*, and authenticated by his certificate or atteſtation as a notary public.

§ 40. A fine was taken at *Edinburgh*, and was regular in every reſpect, except that it was not taken in the preſence of an attorney of any of the courts of *Weſtminſter-Hall*, who might have made the uſual affidavit of its having been duly taken. An affidavit was made by *Seton* the demandant, that there was no ſuch attorney in or near *Edinburgh*; and the court, on the motion of Serjeant *Davy*, who cited *Say* v. *Smith*, allowed the fine. Seton v. Sinclair, 2 Black. Rep. 880. Ante f. 37.

§ 41. The Lord Chief Juſtice of the Court of Common Pleas may alone take the acknowledgment of a fine out of court, a privilege peculiar to that office, and which ſeems to be derived from cuſtom and uſage, for it does not appear that this power is given to the Lord Chief Juſtice by any ſtatute. *Capitalis juſticiarius de banco ſolus per prærogativum officii ſui poteſt capere recognitiones finium, abſque dedimus poteſtatem.* Lord Chief Juſtice of the Common Pleas. 1 Hen. 7. 9 *a*. 2 Inſt. 512. Co. Read. 9. Dyer 224 *b*.

If the Lord Chief Juſtice of the Court of Common Pleas be a party to the writ, he cannot take the acknowledgment of that fine *quia judex in propria cauſa*. This rule extends to all other judges and commiſſioners. Year-Book, 8 Hen. 6. 21. Dyer 220 *b*.

§ 42. By the ſtatute 34 & 35 *Hen.* 8. c. 26. f. 40. it is enacted, that fines ſhall and may be taken before the Juſtices of Wales.

the juſtices of *Wales*, of lands, tenements, and hereditaments, ſituated within their juriſdiction, by force of their general commiſſion, without any writ of *dedimus poteſtatem*, to be ſued for the ſame in like manner and form as is uſed to be taken before the King's Chief Juſtice of the Common Pleas in *England*.

TITLE XXXV.

FINE.

CHAP. V.

Of the Parties to a Fine.

§ 1. *Who may levy Fines.*
3. *The King.*
4. *The Queen.*
5. *Married Women.*
13. *Coparceners, Joint-tenants, and Tenants in Common.*
14. *Perſons outlawed, &c.*
15. *Who are diſabled from levying Fines.*
16. *Perſons having no Eſtate of Freehold in the Lands.*
25. *Aliens.*
26. *Infants.*
30. *Infant Truſtees may levy Fines.*
33. *Idiots and Lunatics.*
37. *Corporations.*
38. *Women ſeiſed of Jointures.*
39. *Eccleſiaſticks ſeiſed* Jure Eccleſiæ.
40. *What Perſons may take Lands by Fine.*

Section 1.

Who may levy Fines.

A FINE being conſidered as a common aſſurance or conveyance of real property, it follows that all perſons of full age and ſufficient underſtanding, may in general levy fines of thoſe lands in which they have any eſtate of freehold, either by right or by wrong.

Elliot's Caſe, Carter 53. Griffin v. Ferrers, Barnes 19. Keys v. Bull, Id. 23.

§ 2. Even perſons who are blind, deaf, or dumb, or who are both deaf and dumb at the ſame time, may levy fines, if it appears that, notwithſtanding thoſe diſabilities, they are capable of comprehending the nature and conſequences of a fine, and can expreſs their meaning by writing or ſigns: and there are three inſtances

inſtances of perſons born deaf and dumb, who were permitted to levy fines.

The King. Dugd. Orig. Jur. 93. Maddox Form. N° 394. 7 Rep. 32.

§ 3. There are ſeveral records of fines publiſhed by *Dugdale* and *Maddox*, to which the King is a party. It was however much doubted in the reign of *James* I. whether the King could levy a fine; and his Majeſty having conſulted Lord Chief Juſtice *Popham* and Sir *Edward Coke* (then Attorney General) on this ſubject, they gave it as their opinion, that although the King could not be cognizor of a fine, becauſe a writ of covenant could not be brought againſt him, yet that if a fine was levied to the King, he might then make a grant and render, which would be good and ſufficient to bind him.

The Queen. 1 Inſt. 3 *a.* 133 *a.* 4 Rep. 23 *b.*

§ 4. The Queen may levy a fine, and a fine may be levied to her; for ſhe has in every inſtance the particular privilege of ſuing and being ſued alone, and is conſidered in all legal proceedings as a feme ſole, and not as a feme covert.

Married Women.

5. As married women might always be impleaded jointly with their huſbands, it follows that they could join with their huſbands in levying fines: and it appears from a paſſage in *Glanville*, and ſome very ancient records publiſhed by *Maddox*, that it was formerly uſual for married women to appoint their huſbands as their attornies to levy the fine for them.

Lib. ii. c. 3. Form. Angl. N° 357.

Maddox Diſſ. 1. 18.

Thus in 9 *Rich.* 1. the prior and convent of *Lewis* fined to the King in half a mark, *ut concordia facta*

inter Richardum de la Combe, & Sybillam de Dene, uxorem ſuam, preſentes per eundem Ricardum virum ſuum, poſitum loco ſuo, ad lucrandum vel perdendum, et Willielmum Priorem et conventum de Lewis tenentem, per Willielmum monachum ſuum de advocatione eccleſiæ de Waldern, unde recognitio de ultima preſentatione ſummonita fuit inter eos in prefata curia, ſcribatur in magno rotulo.

It is probable that married women were, in conſequence of this practice, frequently deceived, and defrauded of their inheritances by their huſbands. The ſtatute *de modo levandi fines* therefore directed, that if a feme covert be one of the parties to a fine, ſhe ought firſt to be examined by the juſtices, and if ſhe refuſed her aſſent to the fine, it ſhould not be levied. 18 Ed. 1. 2 Inſt. 515.

§ 6. When a married woman is a party to a fine, ſhe ought to be examined ſecretly and apart from her huſband, purſuant to this ſtatute, that the Judges or Commiſſioners may inform themſelves whether ſhe joins in the fine of her own free will, or is compelled to it by the threats and menaces of her huſband. Every thing contained in the writ ſhould be diſtinctly named to her; and ſhe ought to be informed of the conſequences of her aſſenting to the fine. But although the ſtatute *de modo levandi fines* thus poſitively directs the private examination of a married woman, yet if ſhe is allowed to acknowledge a fine without being examined, it will bind both her and her heirs for ever, there being no mode of reverſing ſuch a fine; becauſe it cannot afterwards be averred, that 2 Inſt. 515. 3 Atk. 712. Penne v. Peacock, Forreſt. R. 41.

the married woman was not examined, the contrary being recorded.

§ 7. The private examination of a married woman is, however, not directed in all cases, as that circumstance was prescribed by the legislature, only to prevent married women from making an imprudent disposition of their property at the instance of their husbands; so that where a husband and wife acquire any interest by a fine, and depart with nothing, the wife need not be examined, because in that case she cannot possibly be prejudiced. It may therefore be laid down as a certain rule, that a married woman need only be privately examined in levying a fine, where she joins in granting some estate, or departing with some interest.

1 Inst. 515.

Lit. s. 670.
1 Inst. 353 *b*.

Roll. Ab. Tit. Fine (M. 1.)

If a fine be levied to a husband and wife who grant and render a rent, the wife ought to be examined, because by the render she makes herself liable to the payment of the rent.

7 Rep. 8 *a*
10 Rep. 43 *a*.
1 Inst. 46 *a*.
Hob. 225.

§ 8. If a married woman levies a fine of her own inheritance, without her husband, it will bind her and her heirs, because they will be estopped to claim any thing in the lands, and cannot be admitted to aver that she was a married woman, that being contrary to the record. But her husband may enter and defeat such fine, either during the coverture, to restore himself to the freehold which he held *jure uxoris*, or after her death, to restore himself to his tenancy by the curtesy; because no act of a *feme covert* can

transfer that intereſt which the marriage has veſted in the huſband; and if the huſband avoids the fine during the coverture, neither the wife nor her heirs will be barred by it; for, by the entry of the huſband, the whole eſtate which paſſed by the fine is defeated, and the old eſtate of the wife reveſted in her, and the huſband becomes again ſeiſed in right of his wife.

1 Inſt. 46 *a.* n. 7.

Even an entry by the huſband into part of the land, whereof the wife alone levied a fine, will avoid the whole fine.

Mayo v. Combes, 1 Freem. Rep. 396. Pollexf. 164.

§ 9. If a married woman levies a fine executory as a *feme ſole*, and execution is ſued againſt the huſband and wife, the huſband may ſtop the execution of the fine, becauſe no act of his wife's can prejudice him. And if in a caſe of this kind the huſband had made default, and his wife was received in his ſtead, ſhe might for the benefit of her huſband, prevent the execution of her own fine, but, after the death of her huſband ſhe cannot avoid it.

Co. Read. 7. Perk. ſ. 20.

§ 10. If a woman levies a fine by the name of *Mary*, the wife of *Thomas Stiles*, it will be void; becauſe it appears by the very record itſelf that the cognizor was a married woman.

1 Siderf. 122.

§ 11. It is agreed that a wife may, without her huſband, execute a naked authority, though no ſpecial words are uſed to diſpenſe with the diſability of coverture: but if the legal eſtate in lands is veſted in a married woman in truſt for another, ſome hold that

she cannot pass it to the *cestui que trust* unless her husband joins; and therefore, that if she makes a feoffment, or levies a fine without him, the first will be void, the latter voidable: but others are of opinion, that the husband's joining is not more requisite in this than in the former case.

W. Jones 137. 1 Inst. 112 *a.* n. 6.

§ 12. The following is the only case where a married woman has been allowed to levy a fine without her husband.

Moreau's Case. 2 Black. Rep. 1205.

Upon a motion that *Ann Moreau*, wife of —— *Moreau*, might levy a fine without her husband, it appeared that the lands had been sold by the husband, who covenanted that he and his wife (when of age) should levy a fine. When the wife came of age, she refused to join in it; but it was levied by the husband alone, who afterwards went abroad. The wife now consented to levy it, but the husband was absent. It was said that it had been usual in such cases for the cursitor to make out a *præcipe* to the wife as a *feme sole;* but no example of it was produced upon the motion. The Court would make no rule to authenticate such a fine; but it was afterwards acknowledged *de bene esse* before the Lord Chief Justice then in court.

Coparceners, Joint-tenants, and Tenants in Common. 1 Rep. 58. *a.* 6 Mod. 45. 1 Salk. 286.

§ 13. Coparceners, joint-tenants, and tenants in common, may levy fines of their respective shares; and if there be two joint-tenants in fee, and one of them levies a fine of the whole, this will not amount to an ouster of his companion: but it is a severance

of

of the jointure, though they continue to be in of the old uſe.

§ 14. Perſons outlawed or waived in perſonal actions, may alien by fine; for their eſtates ſtill remain in them, although they have forfeited the rents and profits.

Perſons outlawed, &c. Weſt. Symb. p. 2. ſ. 13.

§ 15. Having enumerated the perſons who are capable of levying fines, we ſhall now examine who are diſabled from being cognizors, or conveying by fine. This diſability may ariſe either for want of a ſufficient eſtate in the lands, a competent degree of judgment and underſtanding, or from being incapacitated by their ſituation, or by ſome poſitive act of parliament.

Who are diſabled from levying Fines.

§ 16. No perſon can levy a fine of lands that will affect ſtrangers, unleſs he has at leaſt an eſtate of freehold in them, either by right or by wrong; for otherwiſe it might be in the power of any two ſtrangers to deprive a third perſon of his eſtate, by levying a fine of it; ſo that in every caſe where a fine is levied, and none of the parties to ſuch fine have any eſtate of freehold in the lands whereof the fine is levied, it will only bind the parties themſelves, and their heirs, but may at any ſame time be ſet aſide by the real owner, by pleading that neither of the parties had an eſtate of freehold in the lands at the time when the fine was levied.

Perſons having no Eſtate of Freehold in the Lands. Shep. Tou. 14 Weſt. Symb. p. 2. ſ. 13.

Infra ch. 14.

§ 17. A fine levied before entry or receipt of rent, will be void upon the ſame principle.

Lord Townſend v. Aſh, 3 Atk. 336.

Upon a bill filed for a ſhare in the New River water, the defendants pleaded a fine and non-claim, but it appearing that there was no entry nor receipt of rent until after the fine was levied, Lord *Hardwicke* ſaid, there was not a ſufficient *ſeiſin* to ſupport the fine. His Lordſhip alſo obſerved, that the receipt of rent with a continuance of poſſeſſion before the levying the fine, might have been ſufficient, becauſe thoſe acts would ſhew *quo animo* the fine was levied: ſo that if the rents had been received by the defendants before the fine was levied, and continued to be paid to them, it would have been the ſtrongeſt evidence of poſſeſſion,

Doe v. Williams, Cowp. 621.

§ 18. The tenant in poſſeſſion will not be allowed as an evidence to prove the eſtate of a landlord who levies a fine, becauſe he would then be a witneſs to ſupport his own poſſeſſion.

§ 19. A perſon having a defeaſible right only to lands, may notwithſtanding levy a fine of them, which cannot be ſet aſide by the plea that neither of the parties had an eſtate of freehold in the lands.

Carter v. Barnardiſton, 1 P. W. 505. 13 Vin. Ab. 336.

Sir *Michael Armin* being ſeiſed in fee of the manors of *Pickworth* and *Willoughby*, by his will deviſed, that in caſe his perſonal eſtate, *&c.* ſhould not be ſufficient to pay his debts, then his executors ſhould receive the rents and profits of his whole real eſtate; and after payment thereof, he deviſed the manors of *Pickworth* and *Willoughby* to his uncle *Evers Armin* for life, and in caſe he ſhould have iſſue male, then to ſuch iſſue male

male and his heirs for ever; and in caſe he ſhould have no iſſue male, he deviſed the manor of *Willoughby* to his nephew Sir *Thomas Barnardiſton* in fee. Upon the death of Sir *Michael Armin*, *Evers Armin* entered upon the premiſes deviſed to him, and deviſed them to his grandſon *Armin Bullingham*, and the heirs of his body. Upon the death of *Evers Armin*, Sir *Thomas Barnardiſton* entered upon the premiſes, claiming the ſame by virtue of the remainder limited to him by the will of Sir *M. Armin*. *Armin Bullingham*, the deviſee of *Evers Armin*, entered upon the manor of *Willoughby*, claiming the title thereto, and put his cattle into ſome part of the land, upon which enſued a replevin, and the ſpecial verdict in 3 *Lev.* 431. and 2 *Salk.* 224. This ſuit was afterwards compromiſed between Sir *Thomas Barnardiſton* and *Armin Bullingham*, who both joined in a fine of the manor of *Willoughby*; but previous to this Sir *Thomas Barnardiſton* had conveyed the premiſes by leaſe and releaſe to Sir *Samuel Barnardiſton* in mortgage.

It was contended that this fine was void, as neither of the parties had an eſtate of freehold in the lands; but the Lord Chancellor held, "that in this caſe it could "not be ſaid that *partes finis nihil habuerunt*, becauſe "*Armin Bullingham*, on the death of *Evers Armin*, "and as his deviſee, had a right againſt all perſons "whomſoever but the heir of Sir *Michael Armin* the "teſtator, and *Barnardiſton*, entering upon him as a "diſſeiſor; and though *Barnardiſton* afterwards mort-"gaged the premiſes in fee, yet he continued in "poſſeſſion thereof, and joining with *Bullingham* in

" the fine, it could not be ſaid that *partes finis nihil* " *habuerunt*, when one of them, *viz. Barnardiſton*, " had the poſſeſſion, and the other of them, *viz:* " *Bullingham*, had the right to the land againſt *Bar-* " *nardiſton*, and alſo againſt his mortgagee."

3 Rep. 77 *b.*

§ 20. If a perſon who is only poſſeſſed of lands for a term of years, or who holds them by a ſtatute merchant, ſtatute ſtaple, or writ of *elegit*, or is tenant at will, levies a fine, it will have no effect whatever as to ſtrangers, becauſe the cognizor has no eſtate of freehold.

Co. Cop. f. 55.

§ 21. It follows from the ſame principle, that if a copyholder levies a fine of his copyhold, it is void, becauſe the freehold is in the lord.

1 Inſt. 337 *a.* note.

§ 22. The only mode by which a tenant for years or a copyholder can levy a fine, ſo as to give it any force, is by firſt making a feoffment, by which means he acquires a freehold by diſſeiſin. This doctrine has however been lately queſtioned.

Vide Tit. 36.

§ 23. There are two caſes in which a fine is allowed to operate, although the parties have no eſtate of freehold in the lands. The firſt is where a *ceſtui que truſt* levies a fine of his truſt eſtate, of which the reaſon will be given in a ſubſequent part of this work. And the ſecond is when the fine is levied by a vouchee to the demandant, or from a demandant to a vouchee, which is allowed, becauſe in law the vouchee is ſuppoſed

Ante ch. 2. f. 36.

poſed to be tenant of the land, though in fact he never is ſo at preſent.

§ 24. The averment *quod partes finis nihil habuerunt* cannot be made by a perſon claiming as heir to the cognizor of a fine, and making his title to him or through him. But where a perſon makes mention of any of his anceſtors, in the courſe of his pedigree only, and not as one from whom he claims, he is not barred by his fine, but may aver *quod partes finis nihil habuerunt.*

William Rogers, an idiot, being ſeiſed of a reverſion in fee, *Andrew Rogers*, his uncle, levied a fine of the lands with proclamations to a ſtranger, and died in the lifetime of his nephew: upon the death of the idiot without iſſue, the grandſon of *Andrew Rogers* entered and claimed the lands as heir at law to the idiot; and the queſtion was, whether he was barred by the fine of his grandfather. *Croke* and *Berkeley* were of opinion, that as the lands never deſcended on *Andrew Rogers*, his grandſon was not barred by his fine, but might aver *quod partes finis nihil habuerunt*, for he claimed nothing from him, but only mentioned him in the courſe of his pedigree. Edwards v. Rogers, Cro. Car. 524. 543. 1 Vent. 418. Sir W. Jones 456.

§ 25. An alien not being capable of holding lands, ought not to be permitted to levy a fine; but if he does levy a fine, it will not conclude the King after office found. Aliens.

§ 26. By

Infants.
3 Keb. 480.
2 Leon. 159.

§ 26. By the common law, infants, or perſons under the age of twenty-one years, are incapable of binding themſelves by any contract, which may turn to their prejudice, on account of their ſuppoſed want of judgment and diſcretion at that period; in conſequence of this principle, an infant is incapable of being cognizor in a fine; but if an infant is permitted to levy a fine, and that fine is not reverſed during his minority, it muſt for ever afterwards ſtand good*.

The reaſon that an infant is reſtrained from reverſing a fine levied by him, unleſs it is done during his minority, is, becauſe that fact can only be tried by an inſpection of his perſon in open court. *Non teſtium teſtimonio, non juratorum veredicto, ſed judicis inſpectione ſolummodo.* This mode of trial is adopted, becauſe every judicial act ſhall be intended to have been rightly done, until the contrary appears; and therefore it is fitter that the propriety of ſuch an act ſhould be tried by the court, than by a jury.

1 Inſt. 132 a. 380 b.
12 Rep. 123.

9 Rep. 31.

§ 27. In caſes of this kind a writ iſſues to the ſheriff, commanding him to conſtrain the party to ap-

* In the Rolls of Parliament 50 *Ed.* 3. N° 127. vol. 2. p. 342. there is a petition from the Commons, complaining of the very great hardſhip of not permitting a perſon who had levied a fine, when an infant, to reverſe it after he attained his full age; and praying that every perſon who had levied a fine during his infancy, ſhould be allowed a certain time, ſuch as two years after he attained his full age, to reverſe it; to which the King anſwered, that he would conſider againſt the next Parliament, whether it would be proper to alter the old law in this point or not.

pear,

pear, that it may be aſcertained by the inſpection of his perſon, whether he be of full age or not; *ut per aſpectum corporis ſui conſtare poterit, juſticiariis noſtris, ſi prædictus* A. *ſit plenæ ætatis necne.*

The Judges may alſo examine the infant upon an oath of *voir dire*, or any of his parents, and inform themſelves by means of church books, or any other kind of evidence, if there ſhould ſtill remain a doubt reſpecting the age of the party. 2 Roll. Abr. 573.

§ 28. The peculiar privilege thus given to infants, of averring againſt a record during their infancy, is probably owing to this cauſe. The Judges or Commiſſioners who take the acknowledgment of fines, are ſuppoſed to inſpect the age of all thoſe who acknowledge a fine before them, purſuant to the directions in the ſtatute *de modo levandi fines;* and if, after ſuch inſpection, they are permitted to levy a fine, it is preſumed they are of ſufficient age; and the infant therefore cannot in that court aver his diſability: but if upon a writ of error brought in a ſuperior court he is inſpected and found not to be of full age, the fine may be reverſed; becauſe the public inſpection of an infant by the Judges in a Court of record, is of equal notoriety and authenticity with a former record of the infant's having levied a fine, (which ſuppoſes him to be of full age); and therefore, as both facts are recorded, and contradict one another, the latter fact will prevail. 3 Atk. 711.

12 Rep. 122. If infancy were permitted to be tried by any other mode than the perſonal inſpection of the infant in a Court of Record, averments might be made many years after a fine had been levied, that the perſon who acknowledged it was an infant at the time, by which means records might be avoided by bare averments, which would be productive of the greateſt confuſion.

1 Inſt. 131 *a.* Idem 380 *b.* Keckwith's Caſe, Moore 844. § 29. If the perſon of an infant be inſpected by the Judges, and it is once recorded that he is within age, although the infant ſhould attain his full age, or die before the fine is reverſed, yet he or his heirs may reverſe it, at any time afterwards.

Sarah Griffith's Caſe, 12 Mod. 444. An infant acknowledged a fine, and the cognizee omitted to get it ingroſſed until the infant ſhould attain his full age, in order to prevent him from bringing a writ of error; the court, upon a view of the cognizance produced by the infant, and upon his prayer to be inſpected, and to have his non-age recorded, inſpected him and recorded his infancy, in order to give him the benefit of his writ of error; which he muſt otherwiſe have loſt, as his non-age determined before the next term.

The principles here laid down reſpecting fines levied by infants are confirmed by the following caſes: *Ann Hungate*'s caſe, 12 *Rep.* 122. *Warſcomb* v. *Carrell*, *idem* 124. *Dyer* 220. *Herbert Parrot*'s caſe, 2 *Vent.* 30. 1 *Mod.* 246. *Hutchinſon*'s caſe, 3 *Lev.* 36.

36. *Sherlock's* caſe, *Sty.* 457. *Couſin's* caſe, 1 *Vent.* 69. *Requiſhe* v. *Requiſhe*, *Bulſt.* p. 2. 320. And *Poyntz's* caſe, *Cro. Jac.* 230.

§ 30. By the ſtatute 7 *Ann.* c. 19. it is enacted, that it ſhall and may be lawful to and for any perſon under the age of twenty-one years, by the direction of the Court of Chancery or Exchequer, on the petition of the perſons for whom ſuch infants ſhall be ſeiſed or poſſeſſed in truſt, to convey and aſſure any ſuch lands, tenements, or hereditaments, in ſuch manner as the ſaid courts ſhall direct.

Infant Truſtees may levy Fines.

3 Atk. 164.

§ 31. Upon a petition in Chancery, praying that an infant, the heir of a mortgagee in fee, who was likewiſe a feme covert, might convey by fine under this ſtatute, the Maſter reporting it neceſſary: Lord Chancellor *Hardwicke* ſaid, this queſtion came before him ſoon after he had the ſeals, and that he conſulted with Lord Chief Baron *Comyns*, who thought the court might order an infant who was a feme covert to levy a fine: for the act is general, that all perſons under age ſhall convey and aſſure; and that as a feme covert of full age could not aſſure but by fine, the court may direct an infant to convey in the ſame manner; and an order was made accordingly.

Ex parte Maire, 3 Atk. 479. Com. Rep. 615.

Vide 3 P. Wms. 387.

Lombe v. Lombe, Barnes 217. S. P.

§ 32. By the ſtatute 4 *Geo.* 3. c. 16. it is enacted, that it ſhall and may be lawful for any infants having eſtates in lands, tenements, or hereditaments, within the dutchy of *Lancaſter*, or the counties palatine of *Cheſter*, *Lancaſter*, and *Durham*, or in the principality of

Wales, by the direction of the Court of the Dutchy Chamber of *Lancaſter*, of the Court of Exchequer in the county palatine of *Cheſter*, of the Court of Chancery of the county palatine of *Lancaſter*, of the Court of Chancery of the county palatine of *Durham*, and of the ſeveral courts of the Great Seſſions in *Wales* reſpectively, to convey and aſſure any ſuch lands, tenements, or hereditaments, in ſuch manner as the ſaid ſeveral courts ſhall direct.

Idiots and Lunaticks.

§ 33. Idiots, lunaticks, and generally all perſons of non-ſane memory, are incapable of levying fines; and the ſtatute *de modo levandi fines* expreſsly directs, that perſons of this deſcription ſhall not be permitted to acknowledge a fine: but ſtill, if the Judges or Commiſſioners allow them to levy a fine, it can never afterwards be reverſed by any averment that the cognizors laboured under any of thoſe diſabilities, becauſe the record and judgment of the court being the higheſt evidence in the law, the cognizors muſt be preſumed to have been capable of contracting at the time, and therefore no averment can be admitted to the contrary: and it is ſaid that even a declaration of the uſes of a fine by an idiot or lunatick will be good.

4 Rep. 124.

12 Rep. 124.

§ 34. One *Henry Buſhley*, a monſtrous and deformed cripple and idiot, was taken from his guardian, and carried to a place unknown, where he was kept in ſecret, until he had acknowledged a fine of his lands before Juſtice *Southcot*, to one *Bothome*, and had

had declared the uſe of the fine to *Bothome* and his heirs.

Henry Buſhley was afterwards found by inquiſition to have been an idiot, *a nativitate*, and upon an action brought by a perſon who claimed under *Bothome*, the idiot was ſent out of the Court of Wards upon a man's ſhoulders, to be ſhewn to the Judges of the Court of Common Pleas. Lord Chief Juſtice *Dyer* ſaid, that the judge who took the fine was not worthy to take another: but notwithſtanding this, and although the monſtrous deformity and idiotcy of *Buſhley* was apparent and viſible, yet the fine ſtood good.

It was moved as a doubt in the Court of Wards, whether this fine ſhould not enure to the uſe of the idiot and his heirs; for although it was agreed, that the fine, being of record, bound the idiot, yet it was contended, that the deed executed by the idiot, was not ſufficient to direct the uſes of the fine; but it was reſolved, "That for as much as he was enabled "by the fine as to the principal, he ſhould not "be diſabled to limit the uſes which are but as ac- "ceſſary." 2 Rep. 56 *a.* Hob. 224. Vide infra.

§ 35. One *Hugh Lewing*, who was an idiot, and ſo found by office, levied a fine, and declared the uſes of it by indenture. It was reſolved in the Court of Wards by the Lords Chief Juſtices *Wray* and *Dyer*, that both the fine and declaration of uſes ſhould ſtand good, as neither *Hugh Lewing* nor his heirs could aver Hugh Lewing's Caſe, 10 Rep. 42. Winch 106.

that

that he was an idiot: and it was ſaid by the court, that they would ſooner ſuppoſe the office found to have been erroneous, than bring a judicial act into queſtion, or the judgment of the court in which the fine was levied.

Liſter v. Liſter, Barnes 218.

§ 36. A complaint was made to the Court of Common Pleas, by *Thomas Cuſt*, ſupported by many affidavits, ſetting forth, that *Johanna Liſter*, one of the cognizors, in a fine lately levied, had for ſome years paſt been diſordered in her ſenſes, and was ſo at the time when the ſaid fine was levied. The court thereupon made a rule to ſhew cauſe why the fine ſhould not be vacated, and for *John Hancock*, one of the commiſſioners, (who, with two others took the fine by *dedimus poteſtatem*,) to anſwer the matters in the affidavits. Upon an enlargement of the rule, the court recommended it to them to produce the ſaid *Johanna Liſter*, who reſided in *Yorkſhire*, and accordingly ſhe was brought into court: and being examined by the Lord Chief Juſtice, appeared to be a perſon of good capacity, and very well to underſtand the intent of a fine, and the deed declaring the uſes thereof, which was in favour of her huſband, with whom ſhe had lived many years, and upon whom ſhe was deſirous to ſettle her eſtate, and prevent its deſcending to the ſaid *Thomas Cuſt*, her nephew and heir at law. The court diſcharged the rule, with coſts of the application, and the expences of the ſaid *Johanna*'s journey to *Weſtminſter*, to be paid by *Cuſt*.

§ 37. Corporations

§ 37. Corporations aggregate cannot levy fines; because, as they are inviſible bodies, they can only appear by attorney: whereas the ſtatute *de modo levandi fines* requires that the parties to a fine ſhall appear perſonally before the judges. But Lord *Coke* ſays, that a ſole corporation may acknowledge a fine. Corporations. Co. Read. 7.

§ 38. There are ſome perſons who are reſtrained from levying fines among other modes of alienation by particular ſtatutes. Thus, by the ſtatutes 11 *Hen.* 7. c. 20. and 32 *Hen.* 8. c. 28. women ſeiſed of jointures or eſtates tail of the gift of their huſbands; and huſbands ſeiſed *jure uxoris*, are prohibited from levying fines of ſuch eſtates. An account of theſe ſtatutes, and of the ſeveral caſes which have been decided on them, will be given in Title 36. ch. 8. Women ſeiſed of Jointures.

§ 39. All eccleſiaſticks ſeiſed in right of their churches, as archbiſhops, biſhops, deans and chapters, maſters and fellows of colleges, &c. are reſtrained by a variety of ſtatutes from alienating their church lands, for any longer time than for three lives or twenty-one years, in conſequence of which they are by implication prohibited from levying fines. Eccleſiaſticks ſeiſed *jure eccleſiæ*. 1 Eliz. c. 19. ſ. 5. 13 Eliz. c. 10.

40. With reſpect to the perſons who are capable of being cognizees, and of taking any eſtate by fine, it will be ſufficient to obſerve, that all thoſe who are enabled by the common law to take by way of grant, What Perſons may take Lands by Fine. Shep. Tou. 7.

may alſo take an eſtate by fine, as infants, married women, corporations ſole or aggregate (for an eſtate may be taken in a fine by attorney); or any other perſon, except thoſe who are conſidered in law as civilly dead.

TITLE XXXV.

FINE.

CHAP. VI.

Of what Things a Fine may be levied.

§ 1. *Every Species of real Property.*
7. *Tithes.*
§ 8. *New River Shares.*
10. *By what Descriptions.*

Section 1.

A FINE may be levied of every ſpecies of real property, as of an honour, manor, meſſuage, dove-houſe, garden, orchard, land, meadow, paſture, wood, underwood, fiſhing, warren, fair, toll, waifs, eſtrays, common, *&c.* And, in general, it may be laid down as a certain rule, that a fine may be levied of every thing whereof a *præcipe quod reddat* or *faciat* lies. Every Species of real Property. Co. Read. 11.

There are even ſome things whereof a fine may be levied, although a *præcipe quod reddat* cannot be brought for them, as an office, for which neither a *præcipe* nor an aſſize lies, but only a *quod permittat.* Idem.

§ 2. A fine may be levied of an advowſon in groſs, or right of preſentation to an eccleſiaſtical benefice, of which there are a variety of inſtances in the books. 8 Rep. 145 *b.* 1 Will. R. p. 2, 242.

§ 3. A fine may be levied of a chief rent, a rent-charge, or any other rent which is actually *in eſſe*; but Shep. Tou. 11. 1 Stra. 106.

a fine cannot be levied of an annuity to a man and his heirs, becauſe it is only a perſonal inheritance.

§ 4. A fine may be levied of any thing that lies in prender, provided it can be aſcertained with ſufficient accuracy; but of things uncertain, ſuch as common without number, a fine cannot be levied.

Shep.Tou.13. § 5. As fines may be levied of every kind of real eſtates in poſſeſſion, ſo they may alſo be levied of all lands, tenements, or hereditaments, to which the parties are entitled in remainder or reverſion.

Moor 250. 3 Rep. 88. Shep.Tou.12. § 6. A fine may be levied of an undivided part of a manor, meſſuage, or other real eſtate, as well as of the whole, and the writ muſt be for an undivided moiety, third or fourth part of, &c. &c. But if an entire thing, as a manor or meſſuage, be parted, as if the manor of *S.* be divided into two parts (if the diviſion be ſo made that the manor of that part be not extinct) and a fine is levied of a part of it, it muſt paſs by the name of the whole, as *de manerio de S. cum pertinentiis.*

Tithes. § 7. As the diſſolution of monaſteries by *Hen.* 8. the appropriations of the ſeveral rectories, parſonages, Tit. 22. f. 72. and other eccleſiaſtical benefices, which belonged to the religious houſes, became veſted in the king, who granted them to lay perſons; and, in order to enable ſuch perſons to exerciſe every act of dominion over their new acquiſitions, it was enacted by the ſtatute 32 *Hen.* 8. c. 7. ſ. 7. that in all caſes where any perſon or perſons ſhould

ſhould have any eſtate or intereſt in any parſonage, vicarage, portion, penſion, tithes, oblations, or other eccleſiaſtical or ſpiritual profit which ſhould come into temporal hands and lay uſes, they ſhould have the ſame remedies as for other lands and tenements: "And that "writs of covenants and other writs of fines to be "levied, and all other aſſurances to be had, made, or "conveyed of any parſonage, vicarage, portion, pen- "ſion, or other profit called eccleſiaſtical or ſpiritual, "as is aforeſaid, ſhould be thereafter deviſed and "granted in Chancery according as had been uſed for "fines to be levied and aſſurances to be had or made, "or conveyed, of lands, tenements, or other heredi- "taments; and that all judgments to be given upon "any of the ſaid writs original, ſo to be deviſed or "granted, of or for any of the premiſes, or any of "them, and all fines to be levied and acknowledged "in any of the king's ſaid courts thereof, ſhould be "of like force and effect in law, to all intents and "purpoſes, as judgments given, and fines levied of "lands, tenements, and hereditaments in the ſame "courts, upon writs original therefore duly purſued "and proſecuted; albeit no ſuch form of writs ori- "ginal out of the ſaid Court of Chancery had there- "tofore proceeded or been awarded."

§ 8. A fine may be, and is uſually levied of New River ſhares, by the deſcription of ſo much land covered with water; and whenever a fine is neceſſary to be levied of ſuch ſhares, as the New River runs through three counties, *Hertford*, *Middleſex*, and *London*, there

New River Shares. 2 P. W. 127.

muſt be three ſeveral fines for each of thoſe ſhares, one being neceſſary for each county.

Tit. 1. ſ. 15.

§ 9. It has long been eſtabliſhed in equity, that where a ſum of money is covenanted or directed to be laid out in the purchaſe of land, ſuch money is conſidered as land; but ſtill a fine cannot be levied of it until it is actually laid out in the purchaſe of land.

By what Deſcriptions.

§ 10. With reſpect to the deſcriptions which are neceſſary to be uſed in a writ of covenant, of thoſe things whereof fines are levied, they ſhould be the ſame as thoſe which are uſed in a *præcipe quod reddat*, in an adverſary writ: but a fine being now conſidered as a common aſſurance or conveyance by conſent, it is conſtrued more favourably than a judgment.

Co. Read. 12.

§ 11. An honour may paſs by the name of a manor, or by its proper name, as *de honore de T.* or *de manerio de T.* and where a manor is demanded, it is ſufficient to deſcribe it by its name, without mentioning the town wherein lies, for it may be out of any town, or extend into ſeveral towns.

Weſt. Symb. ſ. 27. Shep. T. 13.

§ 12. Where a manor extends into ſeveral towns, as *A. B.* and *C.* it is good to expreſs all or none; for if any one of the towns be omitted, it is ſaid, no part of the manor ſituated in that town will paſs; although a fine of the manor with the appurtenances would have carried the whole manor.

§ 13. It

§ 13. It was formerly held, that where a fine was levied of a manor, nothing but a real manor would pass, and not a reputed manor. But it has long since been agreed, that a manor in reputation only will pass in a fine by the word manor; and that, when a fine is levied of a manor with its appurtenances, lands reputed to be parcel of the manor will pass. Mallet v. Mallet, Cro. Eliz. 524. 707. Sir M. Finch's Case, 6 Rep. 63.

§ 14. If a person has two manors, which are both known by the name of *Dale*, and he levies a fine of the manor of *Dale* generally, circumstances may be given in evidence to prove which manor was intended to pass by the fine. Gilb. Ev. 38. Bull. N. P. Ed. 1790. p. 297. 6 Mod. 235.

§ 15. Parsonages, rectories, advowsons, vicarages, or tithes impropriate, do not pass by the words "the "advowson of the church of *S.*" but by the words "the rectory of the church of *S.* with the appurte- "nances;" for the word *rectory*, comprehends the parish church, with all its rights, glebes, tithes, and other profits whatsoever *. Shep. Tou. 12.

When a fine is levied of a right of presentation to a church only, the words are "of the advowson of "the church at *S.*" and not "with the appurtenances:" of all vicarages endowed, the writ must be "of the ad- "vowson of the vicarage of *S.*" and not "with the "appurtenances;" and where no vicarage is endowed, Idem.

* *Rectoria pro integrâ ecclesia parochiali cum omnibus suis juribus, prædiis, decimis, aliisque proventuum speciebus; alias vulgo dictum beneficium.* Spelman Gloss. voce *Rectoria*.

it muſt paſs under theſe words, "the advowſon of the "church of *S.*"

Shep. T. 12. § 16. Land ought to be demanded by the certain meaſure of its quantity, according to the uſual mode by which it is meaſured, as an acre, oxgang, hide, rood, *&c.* and by the names which are uſually given to the different ſpecies of land, as arable, meadow, paſture, *&c.*

Waddy v. Newton, 8 Mod. 276. § 17. Where a fine was levied of a certain number of acres of land, it became a queſtion, whether the acres were to be conſidered as cuſtomary acres, or according to the ſtatute *de terris menſurandis;* nor does it appear how the caſe was determined; but Lord *Coke* mentions a caſe where it was adjudged, that in a common recovery of a certain number of acres of land, they ſhould be eſtimated according to the cuſtomary and uſual meaſure of the country, and not according to the ſtatute *de terris menſurandis.*

Sir J. Bruyn's Caſe, 6 Rep. 67 *a.*

§ 18. The particular vill or hamlet, town, hundred, and county in which the lands lie, ought to be mentioned in the fine: and, where a fine was levied of lands lying in two vills, and one of the vills only was mentioned in the writ, it was held, that the lands lying in the other vill did not paſs.

Stork v. Fox, Cro. Ja. 120. § 19. Upon a ſpecial verdict, it appeared that there were two vills, *Walton* and *Street*, in the pariſh of *Street*, a fine was levied of certain lands in *Street;* and whether the lands in *Walton* paſſed by that fine was the queſtion.

queſtion. It was adjudged that they did not paſs, for *Street* being a diſtinct vill, and ſo found by the verdict, although the pariſh of *Street* comprehended them both, yet the lands in *Walton* were not compriſed in the fine. But if the fine had been levied of lands in the pariſh of *Street*, then all had well paſſed.

§ 20. It was found by ſpecial verdict, that *John Eaſton* being tenant in tail of a certain meſſuage and lands called *Eaſton*'s, lying in *Biſhop's Morchard*, levied a fine thereof by the name of a meſſuage and 200 acres of land, 50 acres, *&c.* in *Eſſington*, *Eaſton*, and *Chilford*, to the uſe of him and his heirs; and that there was not any vill, or hamlet, or place, known by the name of the meſſuage or tenement called *Eaſton*'s, out of the vills or hamlets; and that none of the ſaid tenements were in *Eſſington* or *Chilford*. The queſtion was, whether upon this matter found, a fine levied of lands in places known in a vill, not mentioning the vill or hamlet where the lands are, was good? All the judges delivered their opinions *ſeriatim*, that the fine was good.

Faveley v. Eaſton, Cro. Car. 269—276.

§ 21. If a fine be levied of lands in *A.* and the party hath alſo lands in *B.*, yet if the conſtable of *A.* is alſo conſtable of *B.*, all the lands ſhall paſs; for, in ſuch caſe, both places conſtitute the ſame vill.

Upon a ſpecial verdict, it appeared, that a fine had been levied of all the cognizor's land in *A.* and that he had lands in *B.* That a tithing-man was appointed in *B.*,

Waldron v. Roſcarriot, 1 Mod. 78. 1 Vent. 170.

B., but that the conſtables of *A.* exerciſed their authority not only in *A.* but alſo in *B.*

Hale, Chief Juſtice.—"It is true one pariſh may "contain three vills: the pariſh of *A.* may contain the "vills of *A. B.* and *C.*, that is, when there are diſtinct "conſtables in every one of them; but if the conſta- "ble of *A.* doth run through the whole, then is the "whole but one vill in law; or where there is a tith- "ing-man, it may be a vill: but if the conſtable run "through the tithing, then it is all one vill. I know "where three or four thouſand pounds a year hath "been enjoyed by a fine levied of land in the vill of "*A.* in which are five ſeveral hamlets, in which are "tithings; but the conſtable of *A.* runs through them "all, and, upon that, it was held good for all. Here "was a caſe of the conſtable of *Blandford Forum*, "wherein it was held, that if he had a concurrent "juriſdiction with all the reſt of the conſtables, the "fine would have paſſed the lands in all: in ſome "places they have tithing-men, and no conſtables."

§ 22. A fine may be levied of a cloſe by a known name, without mentioning the vill or hamlet in which it lies.

Monk v. Butler, Cro. Jac. 574.

In treſpaſs the queſtion was, whether a fine might be levied of a cloſe by a known name in a vill, without mentioning the vill or hamlet in which it lay? And adjudged that the fine was good enough; for it was but the agreement of the parties; which, being recorded,

corded, although there was neither vill nor hamlet mentioned wherein it lay, was good enough. And, notwithſtanding it was objected that a *præcipe* ought to be in a village or hamlet, or place known out of a village or hamlet, as appeared by all pleadings, for if the place known be within a vill or hamlet, the *præcipe* ought to be brought accordingly: yet it was anſwered, that this was true in a *præcipe* or other writ to which the defendant was to anſwer, but this being but a concord and agreement of the parties, and no exception taken, but the fine drawn and paſſed, it was good.

§ 23. The word *tenement* is not a ſufficient deſcription of any thing whereof a fine is levied, for a tenement may conſiſt of a meſſuage, land, meadow, or any other thing which lies in tenure. And there is an inſtance where a fine levied of two tenements was reverſed by writ of error. Stud and Courtney's Caſe, 1 Leon. 188.

§ 24. When a fine and recovery are of a certain number of acres in *Dale*, it is ſaid, that the party intereſted ſhall have his election where and in what parts of the eſtate the fine and recovery ſhall operate. Blany v. Mahon, 4 Bro. Parl. Ca. 76.

§ 25. It is alſo ſaid, that the deed by which the uſes of a fine and recovery are declared, is the meaſure by which juries uſually go in aſcertaining the deſcription of the eſtates whereof a fine is levied; and that courts of juſtice have frequently directed the deſcription of lands in a fine to be amended, in conformity to the deed of uſes. But a fine will not paſs a greater number Eyton v. Eyton, 4 Bro. Parl. Ca. 149. Jenk. 254.

ber of acres than are contained in the writ and concord, although the deed of uſes mentions more.

Vide Tit. 32. ch. 14. ſ. 13.

§ 26. A fine does not aſcertain, but only compriſes the lands whereof it is levied; ſo that it is in all caſes extremely proper to have a declaration of uſes, that the preciſe lands comprehended in the fine, and intended to paſs by it, may be aſcertained.

2 Atk. 241. 1 Veſ. Jun. 138.

§ 27. There are frequent inſtances of tenants in fee-ſimple, who, in levying fines, inſert more parcels of land than do actually belong to them; in which caſes, Lord *Hardwicke* ſays, a court of equity will reſtrain the operation of the fine, to ſuch lands only as do really belong to the parties.

TITLE XXXV.

FINE.

CHAP. VII.

In what Caſes Fines may be amended.

§ 2. *Original Writ.*
5. *Entry of the King's Silver.*
6. *Proclamations.*
9. *Deſcription of the Lands.*
16. *A Fine recorded of one Term will not be altered to another.*
17. *No change of Chriſtian Name allowed.*
18. *A Fine cannot be amended after Exemplification.*

Section 1.

FINES being now conſidered as common aſſurances made with the conſent of the parties, the Court of Common Pleas has frequently permitted them to be amended, where any palpable miſtake or miſpriſion has been made by the officers of the court, in the entry of the king's ſilver, the proclamations, or the deſcription of the lands.

§ 2. The judges have even, in ſome inſtances, directed the original writ upon which a fine has been levied, to be amended; but the propriety of ſuch amendments ſeems from ſome modern determinations, to be extremely doubtful. Original Writ.

A writ of error was brought to reverſe a fine; and the error aſſigned was, that the writ of covenant bore Gage's Caſe, 5 Rep. 45 *b*.

teſte

teſte the 24th of *April*, returnable *quind. Paſch.* which was the 15th of *April*; ſo that the return was before the *teſte*. It was reſolved by the whole court, that the writ ſhould be amended, becauſe fines were nothing more than common aſſurances, entered into with the mutual conſent of the parties.

This caſe, however, is ſaid to be totally miſreported; and the doctrine here laid down, that an original writ may be amended, has been contradicted by the following determination.

Lord Pembroke v. Lord Jeffries, 1 Salk. 52. Caſes Temp. Holt. 59.

§ 3. Lord *Pembroke* petitioned the Houſe of Lords for a bill to ſet aſide an amendment made in a fine and recovery, by the Court of Great Seſſions in *Wales*. It was referred to the judges, whether the fine and recovery were amendable in thoſe particulars in which they had been amended, and whether ſuch amendments were warranted by law. One of the amendments was in the original writ, which had been teſted ſix months after the *dedimus* for the caption. Lord Chief Juſtice *Holt* certified the opinion of the judges to be, that the writ of covenant being an original writ, was not amendable, either by the common law, or by any ſtatute. That neither the 14th *Edw.* 3. nor the 8th *Hen.* 6. warranted ſuch an amendment. That, as to this purpoſe, there was no difference between adverſary actions and amicable ones: for no court could amend a miſtake in a deed, which was as much a common aſſurance as a fine or recovery, and that *Gage*'s caſe was miſreported, and was not law.

In

In Lord *Raymond's Reports*, vol. ii. 1066, it is ſaid by Mr. Juſtice *Powell*, that the *teſte* of an original writ was not amendable; that it was ſo reſolved by the Houſe of Lords, with the concurrent opinion of all the Judges, upon conſideration of *Gage's* caſe, in the caſe of Lord *Jeffries*, and a judgment given in *Wales* upon the authority of that caſe, was reverſed; and, upon that occaſion, the record of *Gage's* caſe was ſearched for, and found not to warrant the report. And *Holt*, Ch. J. ſaid, that the record of *Gage's* caſe is in *Coke's Entries*, tit. *Error*, p. 9. 250. where the judgment of the court is contrary to the report; for the writ was not amended, but the fine was reverſed.

§ 4. In a late caſe, the Court of Common Pleas refuſed to amend the return of a writ of covenant on which a fine had been levied, becauſe the deed of uſes was ſuſpicious, the fine having been taken from a dying woman. But Sir *William Blackſtone* obſerves, that the court gave no opinion as to the propriety of ſuch an amendment in a fair caſe.

Lindſay v. Gray, 2 Black. Rep. 1013.

§ 5. A miſtake in the entry of the king's ſilver will be allowed to be amended.

Entry of the King's Silver.

Huſband and wife being ſeiſed of the manor of *Empoles*, levied a fine thereof by the name of the manor of *Empoles*, and of a great number of acres of land, meadow, *&c.* according to the common form of fines; and the manor and tenements were valued at 20 marks *per annum*, ſo that the fine in the Hanaper was 1 *l.* 6 *s.* 8 *d.*, and, therefore, the king's ſilver, or poſt fine,

Bohun's Caſe, 5 Rep. 43.

amounted to 40 *s.* The clerk made the entry of the king's ſilver in this form: *Nich. Bohun dat dominæ reginæ* 40 *s. pro licentia concordandi, &c. in placito conventionis* of ſo many acres of lands, meadow, *&c.* omitting the manor: and error being aſſigned on this point, becauſe the king's ſilver was not mentioned to be paid, as well for the manor as for the other tenements, it was reſolved by all the judges, that the roll of the entry of the king's ſilver ſhould be amended according to the writ of covenant; the note, the foot, and the certificate of the judges in theſe words; *de manore de* Empoles, *cum pertinentiis ac, &c.* which were omitted through the negligence of the clerk, for it appeared that the whole ſum was paid, as well for the manor as for the reſidue of the tenements; ſo that no prejudice was done to the queen.

Proclamations.

§ 6. The proclamations in a fine may alſo be amended, even after a writ of error has been brought, in which a defect in the proclamations is aſſigned for error.

Dowling's Caſe, 5 Rep. 44.

Down's Caſe, Idem.

Thus, the proclamations which were indorſed on the foot of the fine were, pending a writ of error, allowed to be amended, according to the proclamations on the note of the fine remaining with the chirographer. And, in another caſe, the proclamations of a fine were allowed to be amended, after a writ of error had been brought, in which that circumſtance was aſſigned for error.

§ 7. So, where a miſtake had been made in the third proclamation on the foot of the fine, and the fourth proclamation was altogether left out; but it appearing that the proclamations upon the record remaining with the chirographer, and in the book of the chirographer were properly made, it was adjudged that the errors in the proclamations ſhould be amended. Pettus v. Godſalve, 13 Rep. 54.

§ 8. In the ſame manner, where a fine was levied in *Mich.* 11 *Eliz.* and the proclamations indorſed by the chirographer, were right. But in the note of the fine delivered to the cuſtos brevium, the ſecond proclamation appeared to have been made on the 20th of *May*, where it ſhould have been the 23d of *May*. The court held, that it ſhould be amended; for the engroſſment upon the fine by the chirographer is the foundation, which being right, is a ſufficient warrant to amend the other, though the court held it a good fine without any amendment. Strilley's Caſe, Hut. 122.

§ 9. The deſcription of the lands intended to be compriſed in a fine is frequently erroneous; but, in ſuch caſes, whenever the deſcription is contrary to the intention of the parties, it will be amended, provided ſuch intention appear from the deed to lead the uſes of the fine, or any other ſufficient circumſtances. Deſcription of the Lands.

§ 10. Serjeant *Pemberton* moved to amend a fine which was levied of the manor of *Ighfield*, where the deed which declared the uſes was of the manor of *Ightfield*, which was the true name, and it was amended. 1 Ld. Raym. 209.

Tregare v. Gennys, Pig. Recov. 218.

§ 11. It appeared to the court, after the examination of the plaintiff and deforciant, the inſpection of a fine levied between the parties, and the indenture declaring the uſes of the fine, that by the omiſſion or miſpriſion of the clerk who made and engroſſed the *præcipe* and concord of the ſaid fine, he ſuppoſed the ſaid tenements to lie among others in the pariſh of *Lanceſton*, when, in fact, there was no ſuch pariſh within the whole county of *Cornwall*; but it ought to have been in the pariſh of St. *Stephen's* near *Lanceſton*. It was ordered by the court, that as well the *præcipe* and writ of covenant, as all entries and records of the ſaid fine, ſhould be amended and rectified, by putting in the words *St. Stephen's near*, as, by law, it ought to be done.

Walker v. Okenden, Caſes of Pract. 52.

§ 12. So, where a motion was made to amend a fine, by inſerting the word *Woorth*, and, on ſhewing cauſe, the rule was made abſolute for the amendment, although it was objected, that the heirs at law would be prejudiced by the amendment. But the court ſaid, they could not take notice whether it would be prejudicial to the heir at law or not, as it was the duty of the court to make the fine agreeable to the deed of uſes, and to the intention of the parties.

Forſter v. Pollington, Barnes 216.

§ 13. Two fines of lands in the iſland of *Antigua* were ordered to be amended, upon hearing counſel for the cognizee and the heirs at law of the cognizors, who had brought writs of error to reverſe the fines. The lands were deſcribed in the writs, &c. *In inſula de Antegoa in America in partibus tranſmarinis, viz. in parochia*

parochia Sanctæ Mariæ Iſlington in comm. Midd. The amendment was by ſtriking out the words *in America in partibus tranſmarinis.* Articles of agreement between the parties to the fines, to convey and aſſure the lands in the iſland of *Antigua*, were read, and *per curiam*, the repugnancy inſerted merely through want of ſkill, and which would vitiate the fines, muſt be rejected, and the fines made effectual, that is, in common form; if they be then inſufficient, advantage may be taken thereof.

§ 14. A fine levied in 1 *Geo.* 1. was ordered to be amended according to the deed of uſes, by ſtriking out the word *parochia*, and inſerting the word *parochiis*; and alſo by inſerting the words *et Melbmerby*. And in *Paſch.* 10 *Geo.* 3. a fine levied in the reign of queen *Anne* was amended by a deed of ſettlement upon marriage, by altering the name of a pariſh in the fine, from *Coxley* to *Corley*; upon reading the deed, the indenture of the fine, and an affidavit, that there was no ſuch pariſh as *Coxley* in the county where the lands lay.

Craghill v. Pattiſon, Barnes 24.

Bohoun v. Burton, 3 Wilſ. Rep. 58.

§ 15. The Court of Common Pleas will not, however, allow the number of acres inſerted in a fine to be increaſed where the deed of uſes is general, and the fine is levied by a huſband and wife.

On a motion to amend a fine by increaſing the number of acres, the deed of uſes being general, and the intent only proved by affidavit, Lord Chief Juſtice *De Grey* obſerved, that amendments anciently were only

Powell v. Peach, 2 Black. R. 1202.

of errors in the proceſs of fines, or miſtakes in the deſcription of the premiſes; and theſe were amended by other parts of the ſame record: but the amendment then requeſted varied the extent of the premiſes from 50 to 84 acres. This, indeed, might be done upon principle, provided it was intended by the parties: but what was the evidence of that intent? The deed to lead the uſes could not be legal evidence of the wife's intent, becauſe ſhe was not examined as to the deed, as ſhe was to the fine, and ſo there was nothing to amend by.

Sir *W. Blackſtone* thought the deed of uſes ſufficient evidence of the intention of the parties, and that it had always been allowed as ſuch even in the caſe of femes coverts; *Luggins* v. *Rawlins*, *Barnes*. But what did the deed of uſes ſay? It deſcribed no number of acres; that was to be proved by *viva voce* evidence, which was too dangerous. He could find no precedent where the quantity or number of acres had been increaſed, much leſs nearly doubled as in this caſe, and was not for making a precedent which would give ſuch an inlet to fraud.

A Fine recorded of one Term will not be altered to another.

§ 16. Although the Court of Common Pleas will amend a fine in matters of form, yet, where a fine is recorded of one term, the court will not alter it and make it a fine of another.

Heath v Sir J. E. Wilmot, 2 Black. Rep. 778. Wilſon on Fines 58.

A fine was taken on the 1ſt of *October* 1770, 10 *Geo.* 3. and acknowledged before commiſſioners, in which Sir *John Eardley Wilmot* (then Lord Chief Juſtice of the Court

Court of Common Pleas) and others were cognizors, which was paſſed, engroſſed, and recorded as a fine of the preceding *Trinity* term; Sir *John* had nothing in the lands until a few days before he acknowledged the fine, and, therefore, in the deed to lead the uſes thereof, it was covenanted by the parties, that the fine ſhould be levied as of the *Michaelmas* term next enſuing the acknowledgment of the fine, but by miſtake the fine was recorded as of the preceding *Trinity* term. Upon producing the deed to lead the uſes of the fine, and ſhewing the miſtake, it was moved that the fine might be altered, and made a fine of *Michaelmas* term, according to the covenant in the deed of uſes; but Lord Chief Juſtice *De Grey*, and the whole Court obſerved, that this was not a motion to amend a fine, but to make a new fine; for Sir *John Eardley Wilmot* having nothing in the lands at the time when the fine was levied and recorded, it could only operate as a bar to himſelf and thoſe claiming under him, ſo that the granting of this motion might prejudice the rights of ſtrangers.

§ 17. No change of the chriſtian names of parties to a fine is allowed by way of amendment.

No change of Chriſtian Name allowed.

On a motion to alter the name of the demandant in a fine from *Robert* to *John* on an affidavit by the attorney concerned, that *John Dixon* was the party meant who had purchaſed a part of the eſtate, and that no deed to declare the uſes of the fine had been executed, the court refuſed the motion.

Dixon v. Lawſon, 2 Black. Rep. 816. *Ex parte* Motley, 2 Boſ. & Pul. Rep. 455.

A Fine cannot be amended after Exemplification.

§ 18. By the ſtatute 23 *Eliz.* c. 3. ſ. 10. it is enacted, that no fine levied before that act, which ſhall be exemplified under the Great Seal, ſhall, after ſuch exemplification, be in anywiſe amended. And by the ſtatute 27 *Eliz.* c. 9. ſ. 10. no fine levied before that act, which ſhall be exemplified under any judicial ſeal of any of the ſhires of *Wales*, or the town or county of *Haverford Weſt*, or under the ſeal of any of the counties palatine, ſhall, after ſuch exemplification, be in anywiſe amended.

TITLE XXXV.

FINE.

CHAP. VIII.

Of the Force and Effect of a Fine at Common Law, and by the Statutes of 18 *Edw.* 1. 27 *Edw.* 1. *and* 34 *Edw.* 3.

§ 1. *Force of a Fine at Common Law.*
7. *Of the Statute* De Modo levandi Fines.
11. *Of the Statute* De Finibus Levatis.
13. *Of the Statute of Non-claim.*

Section 1.

Force of a Fine at Common Law.

HAVING ſtated the various circumſtances which are neceſſary to the levying a fine, we ſhall now proceed to inveſtigate the effects with which it is attended.

By the common law all deciſions of the King's courts were allowed the utmoſt force in aſcertaining the rights of the contending parties: now a fine being conſidered as a compoſition of a ſuit actually commenced, and the concord of a fine coming in lieu of the ſentence which would have been given in caſe the parties had not agreed to terminate the ſuit in this manner, it was allowed to have the ſame force and effect as a judgment of a court of juſtice in a real action. This idea ſeems alſo to have been adopted

Plowd. 357.

from the civil law; for it is ſaid in *Juſtinian's* code, *non minorem auctoritatem tranſactionum quam rerum judicatorum eſſe recta ratione placuit.* And the rule laid down by modern civilians is, *tranſactio inter ipſos tranſigentes eandem vim habet quam res judicata, et propterea cauſa tranſactione deciſa et finita, non magis quam ſententia retractatur, nec alioqui nullus ſit litium finis.*

Cod. lib. 2. Tit. 4. l. 20.

Vin. de Tranſact. c. 8. n. 3.

§ 2. The delivery of poſſeſſion by the ſheriff after a fine was levied, in purſuance of the writ of *habere facias ſeiſinam*, which iſſued for that purpoſe, being equal in point of notoriety to the ceremony of livery of ſeiſin, it was therefore eſtabliſhed, that a fine not only transferred the poſſeſſion, but alſo the right of poſſeſſion. It does not however take away the right of entry of thoſe who have a title to the land, unleſs where it is levied by a tenant in tail in poſſeſſion, in which caſe it operates as a diſcontinuance of the eſtate tail; ſo that the remainder-man or reverſioner is barred of his entry, and has only a right of action left: for although the ſtatute *de donis* ſays, *et ſi finis ſuper huiuſmodi tenementum in poſterum levetur ipſo jure ſit nullus*, yet theſe words were only held to extend to the right of the iſſue in tail, and not to their poſſeſſion. There are however ſeveral caſes, in which a fine does not operate as a diſcontinuance of an eſtate-tail, which will be taken notice of in a ſubſequent part of this work.

1 Inſt. 327 *b.*

Ch. 14.

§ 3. A final judgment in a writ of right, and a chirograph of a fine, were originally conſidered as perfect

perfect bars to all claims whatever from the moment they were completed. Thus *Maddox* has transcribed a record of the 10 *Rich.* 1. where *Roger de Wermedale* was impleaded for lands, of which a fine had been levied: and it was adjudged that he should hold the lands in peace, and that none of the said persons could rightfully implead him, as they were in *patria* when the fine was levied, and made no claim: *Recordatum est per eosdem barones quod post finem et concordiam factam inter prædictos Matildam et Rogerum, &c. traxerunt prædictum Rogerum in placitum de tenemento quod annotatur in rotulo præcedente. Et quod judicium fuit, quod Rogerus teneat in pace tenementum prædictum, sicut continetur in cyrographo facto inter ipsum & prædictum Matildam, & quod nullus prædictorum poterit eum implacitare, eo quod ipsi fuerunt in patria quando finis ille factus fuit, & non posuerunt clameum aliquod in terra illa, sicut prædictus Rogerus contra eos dixit in curia regis in placito, & ipsi hoc non defenderunt.* Diff. p. 14, 15.

§ 4. The effect of a judgment or fine continued to be the same when *Bracton* wrote; and he justifies it upon the principle, that sufficient time was given both in a real action, and the passing a *chirographum* for all those who had any right to make their claim. *Et sciendum quod statim in ipso placito & factione cyrographi, vel ante judicium si presens fuerit in curia, vel si in patria vel in regno infra quatuor maria, nec aliquare poterit ignorantiam, nisi justum interruperit impedimentum, nec ulterius audiri debet (ut videtur) quia terminum habet ad minus unius mensis (secundum communem provisionem regni) infra quem venire potest commode post placitum* Bract. 436. a & b.

placitum motum, quocumque fuerit in regno, infra quatuor maria, quia quilibet implacitatus debet habere ſummonitionem 15 dierum ad minus, quæ rationabilis dici poterit ſummonitio, nec conceditur alicui cyrographum primo die litigii, ſed habebit alium diem per ſpatium 15 dierum ad minus ad capiendum cyrographum ſuum, ut infra totum illud tempus poſſit qui jus habuerit opponere clameum ſuum.

§ 5. A conſiderable alteration was, however, made in this reſpect ſome time between the reign of *Hen.* 3. and that of *Ed.* 1. for in the time of this latter prince, all perſons were allowed a year and a day to claim againſt a judgment or fine. Thus *Fleta* ſays,

Lib. 6. c. 53. *Excipere enim poterit tenens ex taciturnitate petentis vel alicujus anteceſſoris ſui, ut ſi ſubticuerint cum viderint de jure ſuo litigare, vel finalem concordiam facere & clameum ſuum infra annum & diem non appoſuerint.* But if no claim was made within that period, it then became a perpetual bar to all perſons whatever; ſo that a fine was a mode of acquiring lands, which, after a certain time, ſecured the title of the purchaſer againſt every kind of claim.

2 Inſt. 713. § 6. The neceſſity of ſome kind of aſſurance of this kind ſeems to have been very early felt; for it is a maxim of the higheſt antiquity in our law, that all ſales of perſonal property in an open fair or market, are not only good and valid between the contracting parties, but are alſo binding on all ſtrangers who have any right to the things thus ſold: and Lord *Coke*, and the author of *Doctor* and *Student*, are of

Co. Read. 1. Doct. & Stud. Dial. 1. c. 23.

opinion

opinion that the validity of a ſale in an open market, and its efficacy in binding the rights of ſtrangers, was extended to a fine, for the ſecurity of thoſe who were in poſſeſſion of lands *.

§ 7. The utility of fines, and the propriety of allowing them the utmoſt force in ſecuring landed property, produced the ſtatute 18 *Ed.* 1. ſt. 4. uſually called the ſtatute *de modo levandi fines*, which was made for the ſole purpoſe of aſcertaining the manner in which fines ſhould in future be levied, and of declaring their effect. This ſtatute, after regulating the forms which were to be purſued in the paſſing of fines, proceeds thus:—"And the cauſe wherefore ſuch ſolemnity ought to be obſerved in levying a fine is, "becauſe a fine is ſo high a bar, and of ſo great a "force, and of ſo ſtrong a nature in itſelf, that it "concludeth not only ſuch as are parties and privies "thereto, and their heirs, but all other perſons in the "world, being of full age, out of priſon, good me-"mory, and within the four ſeas, the day of the fine "levied, if they make not their claim of their action "within a year and a day, on the foot of the fine."

Of the Statute *De modo levandi Fines.* 18 Edw. 1.

2 Black. Rep. 994.

* The law hath ordained the Court of Common Pleas as a market overt for aſſurances of land by fine; ſo that he who will be aſſured of his land, not only againſt the ſeller, but all ſtrangers, it is good for him to paſs it in this market overt by fine. 3 *Rep.* 78 *b.* For as the common law hath provided a ſure and ſafe way to acquire and get the property of goods by ſale in market overt, ſo alſo the common law hath ordained a ſure manner of conveyance for the purchaſer of lands, which, as our ſtatute ſaith, was by fine. *Co. Read.* 1.

§ 8. In

Rot. Parl. 19 Edw. 1. N° 1. vol. 1. p. 66.

§ 8. In the next year after this ſtatute was made, there is a very ſtrong inſtance of the ſame principle to be found in the Rolls of Parliament. The King having ſeized on the manor of *Sobbirs*, for his year, day, and waſte, on account of a felony committed by *Thomas de Weyland*, *Margery* the wife of the ſaid *Thomas*, and *Richard* his ſon, petitioned the King to be immediately reſtored to the manor; becauſe they had been enfeoffed jointly with the ſaid *Thomas* for their lives, as well by a charter as by a fine levied in the King's Court, which they produced; and as *Thomas de Weyland* was only ſeiſed for life, they contended that the King was not entitled to the year, day, and waſte, nor the lord of the fee to a forfeiture. This caſe was ſolemnly diſcuſſed in Parliament, where it was determined, that, in conſequence of the fine, the manor was not forfeited; and in this judgment is the following remarkable paſſage: *Nec in regno iſto provideatur, vel ſit aliqua ſecuritas, major, ſeu ſolemnior, per quam aliquis vel aliquid ſtatum certiorem habere poſſit, vel ad ſtatum ſuum verificandum aliquod ſolemnius teſtimonium producere, quam finem in curia Domini regis levatum, qui quidem finis ſic vocatur, eo quod finis et conſummatio omnium placitorum eſſe debet, & hac de cauſa providebatur.*

2 Inſt. 511.

§ 9. The principles of natural juſtice require, that thoſe who are diſabled from purſuing their rights ſhould not be bound by their non-claim; and therefore all thoſe who were under the age of twenty-one years, in priſon, of non-ſane memory, or beyond the four ſeas, when a fine was levied, were excuſed from making

Bract. 436 *b*. 2 Inſt. 516. Plowd. 360.

making their claim, both by the common law, and by this ſtatute; and no particular time being preſcribed to them for purſuing their rights, ſuch perſons as happened to labour under any of thoſe diſabilities when a fine was levied, were not obliged to make their claim within a year and day after the removal of their diſabilities, but were allowed to proſecute their rights at any ſubſequent period.

§ 10. By the old law, married women were not bound to make any claim during their coverture, *Item excuſatur uxor quæ ſub poteſtate viri ſuppoſita quod clameum non appoſuerit licet mittere poſſit.* But no ſaving or exception was made in this ſtatute for married women, becauſe their huſbands were always ſuppoſed to be capable of claiming for them. However, if the huſband were within age at the time when a fine was levied, although the wife was of full age, ſtill the infancy of the huſband, whoſe province it was to make the claim, ſaved the right of the wife for ever.

Bract. 436 *b.* 1 Inſt. 260 *b.* Plowd. 360.

§ 11. In caſe of a recovery in a writ of right, or fine executory, the recovery and fine muſt have been executed, and the poſſeſſion delivered to the recoverer or cognizee, otherwiſe they were no bar whatever; becauſe, until there was a tranſmutation of poſſeſſion, ſtrangers were not preſumed to have any notice of the alteration of property, and therefore were not obliged to put in their claim. This rule gave riſe to a great number of ſuits, by the maintenance of the nobility and great barons, during the inſurrections and civil wars which happened in the reign of *Hen.* 3. Aver-

Of the Statute *De finibus levatis.* Co. Read. 14. 2 Inſt. 522. Plowd. 359.

Co. Read. 18. 2 Inſt. 522. 1 Reeves 450.

ments that there was no tranſmutation of poſſeſſion were frequently made againſt fines, and were uſually allowed in the two following caſes; firſt, where a man ſeiſed in fee levied a fine to a ſtranger *ſur cognizance de droit come ceo, &c.* and the cognizee granted and rendered back the ſame lands to the cognizor in tail, for life, or for years; and ſecondly, where a tenant in tail accepted of a fine from a perſon who had nothing in the lands.

§ 12. In theſe caſes, the heirs of the cognizor, who were prejudiced by ſuch fines, were allowed to avoid them by an averment that there was no tranſmutation of poſſeſſion. To remedy this inconvenience a ſtatute was made in the 27 *Edw.* 1. called the ſtatute *de finibus levatis*, enacting, that ſuch averments ſhould not thenceforth be admitted.

This ſtatute alſo directed, that the note of every fine ſhould be read in the Court of Common Pleas in two certain days in the week, and that during ſuch reading all pleas ſhould ceaſe.

Of the Statute of Non-claim.

§ 13. By the common law, and alſo by the ſtatute *de modo levandi fines*, all thoſe who had any right to lands whereof a fine was levied, were obliged to make their claim within a year and a day, unleſs they laboured under ſome one of the diſabilities ſpecified in that act; and it was determined, that, in the caſe of tenant for life, remainder for life, remainder in fee, if the firſt tenant for life had aliened his eſtate, and the alienee had levied a fine, the remainder-man for life might

Plowd, 357. 359. 1 Inſt. 254. 262. 2 Inſt. 51.

might enter and avoid the fine, both as to himſelf, and as to the remainder-man in fee: but if the perſon next in remainder neglected to enter within the year and day, not only he, but alſo the remainder-man in fee, were for ever barred, and a claim by the remainder-man within the year and day would not have ſaved his right, by which means the eſtates of remainder-men and reverſioners were frequently barred by the neglect of the particular tenants.

§ 14. This was certainly a very great grievance, and was ſo ſeverely felt, that, to remedy it, the ſtatute of non-claim 34 *Ed.* 3. c. 16. was paſſed, enacting, "That the plea of non-claim of fines, which from "thenceforth ſhould be levied, ſhould not be taken "nor holden for any bar in time to come."

This ſtatute was made in conſequence of a petition from the Commons, which is publiſhed in the rolls of Parliament, 17 *Edw.* 3. N° 26. *Item que noncleyme des fines levees ſur le rendre en temps a venir ne barre nul home de ſa action.* To which the King anſwered, *Il pleſt au Roi q' deſore ceſt choſe ſoit fait et q' eſtatut ent ſoit fait p' avis des grantz et autres de ſon conſeil.* Rot. Parl. vol. 2. p. 142.

The efficacy of fines was entirely deſtroyed by this ſtatute, and ſtrangers were thereby allowed to claim lands at any indefinite period of time after a fine had been levied of them, which muſt have been productive of very great inconveniences.

§ 15. The

§ 15. The ſtatute of non-claim is ſtill in force with reſpect to fines which are levied without proclamations; and although ſuch fines are no bar to the iſſue in tail, yet when levied by a tenant in tail in poſſeſſion, they operate as a diſcontinuance, and of courſe put the remainder-men or reverſioners to their formedon, which now, by the ſtatute 21 *Ja.* 1. c. 16. muſt be brought within twenty years after the right accrues, unleſs the perſon who has the right labours under any of the diſabilities ſpecified in that ſtatute.

Tit. 31. c. 2. ſ. 10.

TITLE

TITLE XXXV.

FINE.

CHAP. IX.

Of the Force and Effect of Fines by the Statutes 1 Rich. 3. 4 Hen. 7. and 32 Hen. 8. in barring Eſtates Tail.

§ 1. *Of the Statute 1 Rich. 3.*
2. *Of the Statute 4 Hen. 7.*
4. *Of the Statute 32 Hen. 8.*
5. *Operation of theſe Statutes in barring Eſtates Tail.*
6. *Who are Privies within this Statute.*
21. *The Tenant in Tail need not be in Poſſeſſion.*
31. *An Eſtate Tail in a Rent-Charge is barrable.*
32. *And in an Advowſon.*
33. *And in a Truſt Eſtate.*
§ 34. *A Fine bars the Iſſue in Tail before Proclamations.*
37. *Fines in inferior Courts no bar to Iſſue in Tail.*
39. *The Right to levy a Fine cannot be reſtrained.*
40. *A Fine does not bar Remainders.*
41. *But lets in the Reverſion.*
42. *Exceptions in the Statute 32 Hen. 8.*
43. *Effect of the Warranty in a Fine.*

Section 1.

Of the Statute 1 Rich. 3.

IT has been a conſtant remark of thoſe who have had occaſion to trace the hiſtory of our *Engliſh* juriſprudence, that, whenever a material alteration was made in the common law, the inconveniencies ariſing from ſuch change, have been much greater than thoſe which were intended to be remedied.

This obſervation was, perhaps, more fully exemplified by the conſequences which attended the ſtatute of Non-claim, than by any other innovation which has

been attempted in the common law. On this ſubject, it is difficult to add any thing to the force of Lord *Coke*'s expreſſion, "Great contentions aroſe, and few "men were ſure of their poſſeſſions." And it is aſtoniſhing that the Legiſlature ſhould ſuffer a grievance which muſt have been ſo univerſally felt, to continue ſo long: for the common law reſpecting non-claim was not revived until the firſt year of the reign of *Rich.* 3. who ſeems to have attempted to palliate his cruelties, and the uſurpation of the crown, by the many excellent laws which he immediately enacted; one of thoſe was the 1 *Rich.* 3. c. 7. by which the common law was reſtored, and the doctrine of non-claim revived.

1 Inſt. 518.

Bacon's Life of Hen. 7. p. 3.

Of the Statute 4 Hen. 7.

§ 2. This ſtatute was ſoon followed by the 4 *Hen.* 7. c. 24. and as, in this laſt ſtatute, all the clauſes in the 1 *Rich.* 3. are copied almoſt *verbatim*, and ſome additional matters are ſubjoined, the ſtatute 1 *Rich.* 3. is now become uſeleſs and obſolete, and the whole effect of fines depends almoſt entirely, at this day, on the 4 *Hen.* 7. for which reaſon, it will be neceſſary to explain it at large.

This act, after reciting the laſt clauſe in the ſtatute *de finibus levatis*, proceeds thus: "The king our ſo-"vereign lord conſidereth that fines ought to be of "the greateſt ſtrength to avoid ſtrifes and debates, "and to be a final end and concluſion; and of ſuch "effect were taken afore a ſtatute made of non-claim, "and now is uſed the contrary, to the univerſal trou-"ble of the king's ſubjects; will therefore it be or-"dained," &c.

The firſt ſection which directs the proclamations to be made, has been already ſtated. Ch. 2. f. 59.

§ 3. *Sect.* 2. "And the ſaid proclamations ſo had "and made, the ſaid fine to be a final end, and con- "clude, as well privies as ſtrangers to the ſame, ex- "cept women covert, other than be parties to the ſaid "fine, and every perſon then being within the age of "21 years, in priſon, or out of this realm, or not of "whole mind at the time of the ſaid fine levied, not "parties to ſuch fine."

We have ſeen that, by the common law, a fine levied of an eſtate tail, only operated as a diſcontinuance of it, and did not bar the iſſue from bringing their formedon. But, in conſequence of ſome ambiguous expreſſions in this ſtatute, it was ſuppoſed to enable tenants in tail to bar their iſſue by a fine; eſtates tail, however, had continued ſo long, and were ſo much favoured by the nobility, on account of their not being forfeitable for treaſon, that the judges were extremely cautious of putting ſo extenſive a conſtruction on it, eſpecially as the ſtatute *de Donis Conditionalibus* expreſsly declares that a fine levied of an eſtate tail ſhould be void.

A caſe, however, aroſe, in 19 *Hen.* 8. in which this point came in queſtion before all the judges in *Serjeants' Inn;* a tenant in tail levied a fine, and the five years paſſed in his lifetime; he afterwards died, and the queſtion was, whether his iſſue ſhould be barred by the fine? *Engleſield*, *Shelley*, and *Coningsby*, contend- Bro. Ab. Tit. Fine, pl. 1. Dyer 3 *a.* 1 Inſt. 121 *a.* *n.* 1.

ed, that the iſſue was not barred, becauſe he was neither privy nor party to the fine, for he claimed the land from the donor, and not from the donee, although he muſt convey himſelf to the land by the father. On the other ſide *Fitzjames*, *Brudenell*, *Fitzherbert*, *Brooke*, and *Moore*, were of opinion, that the iſſue was barred, for the intention of the makers of the ſtatute was, that a fine ſhould be a final end, and conclude as well privies as ſtrangers; and that the third ſaving only extended to ſtrangers, but not to privies.

Of the Statute 32 Hen. 8.

§ 4. This determination of the Judges ſeems not to have been entirely approved of; for, in 32 *Hen.* 8. a ſtatute was made, reciting, that doubts had ariſen reſpecting the validity of the ſtatute 4 *Hen.* 7. in barring the iſſue in tail; and enacting, "That all and ſingular "fines, as well heretofore levied as hereafter to be "levied, with proclamations according to the ſtatute, "by any perſon or perſons of full age of one and "twenty years, of any manors, lands, tenements, or "hereditaments, before the time of the ſaid fine le- "vied, in anywiſe intailed to the perſon or perſons ſo "levying the ſaid fine, or to any of the anceſtors of "the ſame perſon or perſons in poſſeſſion, reverſion, "remainder, or in uſe, ſhall be, immediately after the "ſame fine levied, engroſſed, and proclamations made, "adjudged, accepted, deemed and taken, to all in- "tents and purpoſes, a ſufficient bar and diſcharge for "ever againſt the ſaid perſon and perſons, and their "heirs, claiming the ſaid lands, tenements, and he- "reditaments, or any parcel thereof, only by force "of ſuch intail, and againſt all other perſons claiming

32 Hen. 8. c. 36. ſ. 1.

" the ſame or any parcel thereof, only to their uſe, or " to the uſe of any manner of heir of the bodies of " them, any ambiguity, doubt, or contrariety of opi- " nion ariſen or grown upon the ſaid ſtatute to the " contrary notwithſtanding."

Operation of theſe Statutes in barring Eſtates Tail.

§ 5. The ſtatute of 32 *Hen.* 8. having been profeſſedly made for the purpoſe of explaining the ſtatute 4 *Hen.* 7. they muſt be conſidered as forming one law. The doctrine eſtabliſhed by them is, that a fine with proclamations ſhall bar all privies and ſtrangers; and, when levied of any manors, lands, tenements, or hereditaments, intailed to the perſon levying ſuch fine, or to any of his anceſtors, ſhall bar the ſaid perſons and their heirs claiming by force of ſuch intail.

Who are Privies within this Statute.

1 Inſt. 271 *a.* 8 Rep. 42 *b.*

§ 6. The term by which the iſſue in tail is deſcribed in the ſtatute 4 *Hen.* 7. is that of privy, which has various ſignifications in law; it ſometimes means that connection which ariſes between perſons who have entered into a mutual contract with each other, as between donor and donee, leſſor and leſſee; or elſe it ſignifies a relationſhip of blood, as between anceſtor and heir. But, in conſequence of the ſtatute 32 *Hen.* 8. it has been determined, that, by the word privies, are meant thoſe perſons who are not only privies in blood to the perſons who levy the fine, but alſo privies in eſtate and title to the land whereof the fine is levied, that is, thoſe who muſt neceſſarily convey their deſcent through the cognizor before they can make out their title to the eſtate, which comprehends the iſſue in tail; and a perſon who is privy within the intention of the

Shep. Tou. 21. 4 *Hen.* 7. is an heir in tail within the intention of the 32 *Hen.* 8. *et ſic e converſo.*

§ 7. Thus, if a tenant in tail in poſſeſſion levies a fine with proclamations, it will be an effectual bar to all his iſſue; for they are privy to him both in blood and eſtate, and can only make a title to the eſtate tail as his ſons.

Dyer 351 *b.* § 8. So, where huſband and wife were tenants in ſpecial tail, and the huſband alone levied a fine, it was determined in 18 *Eliz.* and alſo in 10 *Ja.* 1. that it was a good bar to all their iſſue; for, in making out their title, they muſt neceſſarily ſhew themſelves to be heirs to the father as well as to the mother; and, therefore, they are privies both in blood and eſtate to the cognizor of the fine.

Beaumont's Caſe, 9 Rep. 138.

1 Inſt. 372 *a.* § 9. Lord *Coke* ſays, that if lands were given to the elder ſon and the heirs of his body, remainder to his father and the heirs of his body, and, after the father's death, the eldeſt ſon had levied a fine with proclamations, and died without iſſue, the ſecond ſon would have been barred by the fine; becauſe the remainder, which was limited to the father and the heirs of his body, having deſcended on the eldeſt ſon, the ſecond ſon, in making out his title to this remainder, muſt convey his deſcent through his eldeſt brother, by which means, he would become a privy to him both in blood and eſtate.

§ 10. It

§ 10. It has been ſtated in a former title, that a limitation to the heirs of the body of *A.*, provided *A.* be dead when the limitation takes effect, will veſt in the perſon anſwering the deſcription of ſuch ſpecial heir; and, in caſe of his death without iſſue, will go to the perſon who would be entitled to ſuch eſtate, if it had originally veſted in the anceſtor of the firſt taker. And that this devolution, after the deceaſe and failure of iſſue of the firſt ſpecial heir of *A.*, to the other heirs equally falling within the ſame deſcription, is *quaſi* a deſcent *per formam doni;* from which, it follows, that if the firſt, or any other of the perſons taking an eſtate in this manner, levies a fine of it, the eſtate tail will be barred, becauſe all the perſons taking under the original words are in by a ſpecies of deſcent, and are, therefore, privies to thoſe who take before them. Tit. 33. ch. 24. ſ. 36.

§ 11. The privity muſt be both in blood and eſtate, for privity in blood only will not be ſufficient; and, therefore, if lands be given to a man and the heirs females of his body, who has a ſon and a daughter, and the ſon levies a fine and dies without iſſue, it will be no bar to the daughter; for although ſhe is privy in blood to her brother, yet ſhe is not privy in eſtate or title to him, as ſhe can make her title to the eſtate without conveying her deſcent through him, or even mentioning him. Shep. T. 21.

§ 12. It follows, from the ſame principle, that if a tenant in tail has iſſue a daughter who levies a fine, and afterwards a ſon is born, he will not be barred by his ſiſter's fine, becauſe he can make his title to the Hob. 333.

eſtate tail, as heir of the body of his father, without conveying his deſcent through his ſiſter.

Jenk. 275. § 13. If a fine be levied to a ſtranger tenant in tail, and the tenant in tail grants and renders his eſtate to the ſtranger, ſuch a fine will bar the iſſue in tail.

Smith v. Stapleton, Plowd. 430. § 14. As a tenant in tail may convey his whole eſtate by fine, ſo he may create any leſſer eſtate out of it, which will likewiſe bind his iſſue after his death.

Shep. T. 26. § 15. If the iſſue in tail levies a fine in the life-time of his anceſtor, who is then ſeiſed of the eſtate tail, the anceſtor himſelf may afterwards levy a fine, and thereby bar his iſſue, and alſo the perſon to whom the iſſue levied the fine. So that, in all caſes of this kind, it is underſtood, that the tenant in tail dies without barring the eſtate tail, by which means, it deſcends upon the iſſue.

2 Wilſ. R. 220. § 16. A tenant in tail, being guilty of murder, levied a fine before conviction; and it was doubted, whether it ſhould bar the iſſue for the lord's benefit. The court inclined to think it ſhould; but no judgment was given.

7 Rep. 52 *a.* Plowd. 227. § 17. Where the king is tenant in tail, he may, by a fine, levied on a grant and render, bar his eſtate tail; becauſe, it being determined in Lord *Berkley*'s caſe, that the king was bound by the ſtatute *de donis*, it was but reaſonable his Majeſty ſhould take advantage of thoſe

thoſe ſtatutes, which enable tenants in tail to bar their eſtates.

§ 18. A fine *ſur conceſſit* will bar an eſtate tail as long as it continues in force, and, therefore, any eſtate created by a fine of that kind, will be good againſt the iſſue in tail. Earl of Rutland's Caſe, Cro. Jac. 40. Jenk. Cent. 321.

§ 19. Although a fine, levied by a tenant in tail, may be defeated by a perſon claiming ſome particular eſtate in the lands of which the fine is levied, yet it will ſtill continue to be a good bar to the iſſue in tail.

§ 20. A tenant in tail diſcontinued in fee, afterwards diſſeiſed the diſcontinuee, and levied a fine with proclamations; the diſcontinuee entered on the land, and avoided the eſtate, which paſſed by the fine as to himſelf. The queſtion was, whether the heir in tail was remitted or not: and the judges were unanimous that the heir in tail was not remitted, but was barred by the ſtatute 32 *Hen.* 8., although the eſtate which paſſed by the fine was avoided. The ſame point was determined in the caſe of *Hunt* v. *King*, which will be ſtated in this chapter. 1 And. 43. 3 Rep. 91 *a.* Com. Rep. 216.

§ 21. It is not neceſſary that a tenant in tail ſhould be in the actual poſſeſſion of the eſtate tail, in order to be capable of barring his iſſue by fine; for the ſtatute 4 *Hen.* 7. has expreſsly excluded parties and privies to a fine from averring *quod partes finis nihil habuerunt*; and the ſtatute 32 *Hen.* 8. makes a fine levied of any lands The Tenant in Tail need not be in Poſſeſſion.

lands intailed to the perſon ſo levying the ſame, or to any of his anceſtors, a ſufficient bar againſt ſuch perſon and his heirs. A fine, therefore, with proclamations duly levied by the perſon who has the right of an intail in him, will be a good bar to his iſſue, although at the time when the fine was levied, he had never entered on the eſtate tail, or had only an eſtate tail in remainder, or had even made a feoffment, or any other conveyance of it.

Zouch v. Bamfield, 3 Rep. 88. 1 Leon. 75.

§ 22. *Edward* Lord *Zouch* brought a formedon in the deſcender for a moiety of a manor againſt one *Bamfield*, who pleaded in bar that *John*, great-grandfather of the demandant, levied a fine *ſur cognizance de droit come ceo*, with proclamations of the ſaid moiety, which was granted and rendered by the ſame fine to the ſaid *John* and his heirs, whoſe eſtates the tenant had. Lord *Zouch* replied, that at the time when the fine was levied, and at all times after, the ſaid *Bamfield* was ſeiſed of the land in his demeſne as of fee. And on ſolemn argument, it was determined by all the judges, that the demandant, being heir in tail to the perſon who levied the fine, could not aver the continuance of the land in a ſtranger, nor that *partes finis nihil habuerunt*, becauſe the ſtatutes 4 *Hen.* 7. and 32 *Hen.* 8. bound the eſtate tail, although the perſon who levied the fine was not then in poſſeſſion of the eſtate tail, which, Lord *Coke* obſerves, was the firſt determination on this point.

§ 23. A fine levied by a tenant in tail in remainder, expectant on an eſtate for life, or an eſtate tail, will be

be a good bar to the iſſue of the perſon who levies the fine.

A. being tenant for life, remainder to *B.* in tail, reverſion to *B.* and his heirs, *B.* levied a fine with proclamations of the eſtate tail, during the life of the tenant for life; and it was adjudged to be a good bar to the eſtate tail under the words of the ſtatute 32 *Hen.* 8. Caſe of Fines, 3 Rep. 84. Jenk. 274.

§ 24. If a tenant in tail makes a feoffment of the eſtate tail, and afterwards levies a fine of it, his iſſue will be thereby barred. 3 Rep. 90 *a.*

William King, the grandfather, being tenant in tail, enfeoffed *Richard King*, the father, in fee; and, afterwards, *William King* diſſeiſed him, and levied a fine with proclamations to one *Hitchcock*. The father entered, and the cognizee of the fine entered on him: after the death of the grandfather and father, the ſon brought a formedon for the recovery of the land, to which this fine was pleaded in bar: the demandant pleaded the entry of his father, and judgment was given for him. A writ of error was brought, and error aſſigned in matter of law, that this fine was a good bar to the iſſue in tail by the ſtatute 32 *Hen.* 8., for it was not to be compared to a fine at common law, nor to fines levied by other perſons, becauſe, in this caſe, it was ſufficient that the fine was levied by the perſon who had the right of the eſtate tail in him, or to whom the land was intailed, although none of the parties to the fine had any eſtate of freehold in poſſeſſion, Hunt v. King, Cro. Eliz. 610.

ſion, remainder, or reverſion, in the land whereof it was levied, as it was adjudged in the caſe of *Zouch* v. *Bamfield.* The court being of this opinion, the judgment was reverſed.

Ante f. 22.

3 Rep. 90 *a.* Jenk. 275.

§ 25. Although a tenant in tail be diſſeiſed of the eſtate tail, yet, if during the diſſeiſin, he levies a fine to a ſtranger, it will bar his iſſue, who will not be allowed to plead, that his anceſtor was not ſeiſed of the eſtate tail when he levied the fine.

§ 26. In caſe of a lineal deſcent, the iſſue in tail may be barred by the fine of his anceſtor, although, at the time of levying the fine, the anceſtor had only a poſſibility of an eſtate tail, which never took effect, becauſe the iſſue, in making his title, muſt convey his deſcent through ſuch anceſtor, which makes him a privy to him.

Archer's Caſe, 3 Rep. 90 *a.* Hob. 333.

Lands were given to *A.* and his wife in ſpecial tail; *A.* died, leaving iſſue a ſon, who diſſeiſed his mother, and levied a fine with proclamations. It was reſolved by all the judges, that this fine was a good bar to the iſſue of the ſon, although the ſon, at the time when he levied the fine, had only a poſſibility of an eſtate tail, his mother being then alive; for the ſtatute 32 *Hen.* 8. ought to be expounded according to the letter of it, and as the land was intailed to the anceſtor of the perſon who levied the fine, although ſuch anceſtor was alive, ſo that no eſtate or right had deſcended on the perſon who levied the fine which he could paſs or extinguiſh, yet as the ſtatute ſays, "intailed to the per-

"ſon

"ſon ſo levying the ſame, or to any of his anceſtors," in the diſjunctive, it was adjudged that the fine did bar the right which afterwards deſcended to him, not only as to himſelf, but alſo as to all his iſſue.

§ 27. This principle was carried much further in the following caſe:

William Grant deviſed his lands to *John Grant*, when he ſhould attain the age of twenty-five years, to hold to him and the heirs of his body. *John Grant*, the deviſee, after he had attained the age of 21 years, but before he was 25, levied a fine of the lands thus deviſed; and the queſtion was, whether it ſhould bar his iſſue. It was reſolved, that the eſtate tail was barred by this fine, although *John Grant*, when he levied it, had but a bare poſſibility of an eſtate tail. Lord *Coke* ſays, that no judgment was given: but *Croke* and *Leonard*, who have reported this caſe by the name of *Johnſon* and *Bellamy*, ſay that judgment was given, that the eſtate tail was barred by the fine. And, in Sir *Thomas Raymond's Reports*, 149. it is ſaid, that although the eſtate was not barred by the 4 *Hen.* 7. it was well barred by the 32 *Hen.* 8. in conſequence of theſe words, "All fines, levied by any perſon or perſons, *&c.* of "any manors, *&c.* before the time of the ſaid fine "levied in anywiſe intailed to the perſon or perſons ſo "levying the ſame fine, or to any of the anceſtors of "the ſame perſon or perſons."

Grant's Caſe cited, 10 Rep. 50 *a.*

Cro. Eliz. 122.
2 Leon. 36.

§ 28. In the caſe of a collateral deſcent, a fine levied by a perſon who was never ſeiſed of the eſtate tail, and

on

on whom it never deſcended, but who had only a poſſibility of an eſtate tail, is no bar to a collateral heir in tail, of the perſon who levied the fine; becauſe, in making his title to the eſtate tail, he need not convey himſelf through him, ſo that he is not a privy to him.

Mackwilliam's Caſe, Hob. 332. Sir W Jones, 31. S. C. by the name of Godfrey v. Wade.

§ 29. A huſband made a feoffment to the uſe of himſelf and his wife, and the heirs male of their two bodies, remainder to the heirs male of the body of the huſband, remainder to the heirs of their two bodies, remainder in fee to the huſband. The huſband and wife had iſſue a ſon and a daughter, the huſband died; the ſon made a leaſe to commence after the death of his mother, then levied a fine with proclamations to the uſe of himſelf in fee, and died without iſſue in the life-time of his mother. The queſtion was, whether this leaſe was good againſt the daughter? It ſhould previouſly be obſerved, that the eſtate tail limited to the huſband and wife, and the heirs male of their bodies, veſted wholly in the wife after the death of her huſband, although ſhe was within the ſtatute 11 *Hen.* 7. c. 20, and the remainder to the heirs male of the body of the father was in the ſon at the time when he levied the fine; but theſe eſtates became extinct when the mother and ſon died, ſo that the leaſe in queſtion could only be derived out of the remainder to the heirs of the bodies of the huſband and wife, to which both the ſon and the daughter were inheritable. It was determined by Lord Chief Juſtice *Hobart*, *Hutton* and *Jones*, againſt the opinion of *Winch*, that although, in a lineal deſcent the iſſue in tail were barred by the fine of their

anceſtor,

anceſtor, notwithſtanding ſuch anceſtor had but a poſſibility of an eſtate tail when he levied the fine; yet, in a collateral deſcent, the caſe was very different, as it was not neceſſary that the iſſue in tail ſhould make mention of every collateral iſſue inheritable before him, as in a lineal one; and that, in the preſent caſe, as the eſtate tail never deſcended on the ſon, his fine could be no bar to his ſiſter, who was not privy to him, becauſe ſhe could make her title to the eſtate tail without conveying her deſcent through him, or even mentioning him in her pedigree. Judgment was therefore given, that the leaſe was void as to the ſiſter; but it was obſerved, that if the eſtate tail had deſcended on the ſon, his fine would then have barred his ſiſter, becauſe, in that caſe, ſhe muſt have conveyed her deſcent through him, in order to make out her title to the eſtate tail, by which means, ſhe would have been a privy to him.

§ 30. So, where an eldeſt ſon levied a fine of an eſtate tail, which was then veſted in his mother, and died in the life-time of his mother, by which means the eſtate tail never deſcended on him. It was adjudged in the Common Pleas, by three judges againſt one, that this fine did not bar the ſecond brother. And, upon a writ of error, all the judges of the King's Bench were of the ſame opinion, becauſe, as the eſtate tail never veſted in the elder brother, the younger brother was not a privy to him.

Bradſtock v. Scovell, Cro. Car. 434.

§ 31. A tenant in tail of a rent-charge may bar it, by levying a fine of the lands out of which the rent iſſues. Upon

An Eſtate Tail in a Rent-Charge is barrable.

Heliot v. Saunders, Cro. Jac. 700. 1 Vez. 391.

Upon demurrer, the caſe was thus: A perſon who was tenant in tail of a rent-charge out of the manor of *Kingsbury*, granted by Sir *Ambroſe Cave*, levied a fine of the manor to Sir *Ambroſe Cave* and his heirs, and this fine was pleaded in bar of an avowry for this rent by the heir in tail. The fine was levied of the rent *per nomen manerii*, and an averment was made that the fine was levied by agreement of the parties with an intent to bar the rent. The defendant pleaded, non-compriſed, which being demurred to, and argued ſeveral times, it was held by *Hobart* Chief Juſtice, and *Harvey*, that the rent was barred by the fine, becauſe the fine being levied of the land, paſſed the rent incluſively, it being directed by the agreement of the parties.

And in an Advowſon, Plowd. 435. Watſon 84.

§ 32. As a fine may be levied of an advowſon in groſs, ſo a tenant in tail of an advowſon in groſs may bar his iſſue by a fine levied of it according to the ſtatute 4 *Hen.* 7. It is, however, ſaid in *Plowden*, that if a tenant in tail of an advowſon grants or renders to another by fine, the nomination of a clerk to the advowſon, this will not bind the iſſue, becauſe the right of nomination is a thing diſtinct from the advowſon, and not intailed; but modern writers have thought differently on this ſubject, on the principle, that the preſentation and nomination are in effect the ſame thing, being the fruit and full profit of the patronage. But if a tenant in tail of an advowſon grants by fine the nomination of a clerk to one and his heirs, ſo that when the church becomes void, the grantor and his heirs may nominate a clerk to the tenant in tail and his heirs, and

and that he or they ſhall preſent the clerk ſo nominated to the ordinary; ſuch a fine will not bind the iſſue in tail, becauſe there the nomination and preſentation are diſtinguiſhed, ſo that the fine is not levied of the thing intailed.

And in a Truſt Eſtate. Vide ch. 19. ſ. 23.

§ 33. If a perſon is tenant in tail of a truſt-eſtate and levies a fine of it, ſuch fine will have as extenſive an operation in barring his iſſue, as if he had been ſeiſed of the legal eſtate.

A Fine bars the Iſſue in Tail before Proclamations.

§ 34. Although no fine is a bar to an eſtate-tail, but a fine with proclamations, levied purſuant to the ſtatute 4 *Hen.* 7. yet as ſoon as a fine is levied, and before all the proclamations are paſt, it is a good bar to an eſtate-tail, provided the proclamations are duly made, and the iſſue in tail cannot ſave his right by entering before all the proclamations are made.

Plowd. 434.

This point was formerly much doubted, and in the caſe of *Smith* and *Stapleton*, 15 *Eliz.* it was contended by the counſel, that in conſequence of the words in the ſtatute 4 *Hen.* 7. "And the ſaid proclamations ſo "had and made, the ſaid fine to be a final end, and "conclude as well privies as ſtrangers, *&c.*" And alſo the words in the ſtatute 32 *Hen.* 8. "after the "ſame fine levied, ingroſſed, and proclamations made, "*&c.*" A fine was no bar to the iſſue in tail, if the anceſtor died before all the proclamations were made: and *Brooke* ſeems to have been of the ſame opinion; the contrary, however, was determined in the following caſe:

Bro. Ab. Tit. Fine, 109.

Purſlow's Caſe, cited 3 Rep. 90.

§ 35. Sir *George Blount* being tenant in tail of ſeveral manors, and having iſſue a daughter, levied a fine and ſoon afterwards died. The daughter immediately brought a formedon for the recovery of the eſtate-tail, pending which, all the proclamations were made. It was unanimouſly determined, that the daughter was barred by this fine, although her anceſtor died, and ſhe commenced her action, before all the proclamations were made. Lord *Coke* makes four obſervations on this caſe.

1ſt, That although, after a fine is levied, a right to an eſtate-tail deſcends to the iſſue, yet as ſoon as the proclamations are made, the right which thus deſcended is barred by the fine.

2d, Although a formedon is brought and purſued, yet, if the proclamations are all afterwards duly made, the fine will then be a good bar.

3d, When tenant in tail levies a fine, and dies before all the proclamations are made, the iſſue in tail is not within any of the ſavings of the 4 *Hen.* 7. for if he were, then the bringing his formedon before all the proclamations were made, would avoid the fine.

4th, That the proclamations ſerve no other purpoſe but that of diſtinguiſhing a fine levied purſuant to the ſtatute 4 *Hen.* 7. from a fine at common law.

Caſe of Fines, 3 Rep. 84.

§ 36. So where a tenant in tail levied a fine, and died before all the proclamations were made, leaving

a ſon, who was beyond ſea, who returned after all the proclamations were made, and claimed the land. It was reſolved by all the Judges, that although a right of entail deſcended to the ſon on the death of his father, in conſequence of his dying before all the proclamations were made; yet, when all the proclamations paſſed, the right which deſcended to him was for ever barred, and the iſſue could not have ſaved it by any claim.

§ 37. We have ſeen that fines may be levied in courts of ancient demeſne, and other inferior courts; but they have only the operation of fines at common law which is to create a diſcontinuance, when levied of an eſtate-tail, and do not bar the iſſue from bringing a formedon; for no fine unleſs it is levied with proclamations, purſuant to the ſtatute 4 *Hen.* 7. has the effect of baring an eſtate-tail, without a particular cuſtom.

Fines in inferior Courts no Bar to Iſſue in Tail.

Com. Rep. 624.

§ 38. There is one ſpecies of eſtate-tail which is protected from the operation of the ſtatutes 4 *Hen.* 7. and 32 *Hen.* 8. that is, an eſtate-tail given or procured to be given by the crown, as a reward of ſervices, where the remainder or reverſion is veſted in the crown; of which notice will be taken in a ſubſequent chapter.

§ 39. The privilege of levying a fine purſuant to thoſe ſtatutes, is an incident ſo inſeparably annexed to an eſtate tail, that any condition or proviſo reſtraining or prohibiting it, is held to be repugnant to the nature

The Right to levy a Fine cannot be reſtrained. 1 Inſt. 223 *b.* note 1. 1 Vent. 321. 2 Vern. 233.

ture of the eſtate, and therefore void. But a tenant in tail may be reſtrained from levying a fine at common law, becauſe that is a tortious act, and only operates as a diſcontinuance to the iſſue.

A Fine does not bar Remainders.

§ 40. Before we quit this ſubject it may be proper to obſerve, that the operation of a fine is merely to bar the eſtate tail, but not the remainders or reverſion which depend upon it: for a fine levied by a tenant in tail in poſſeſſion, only diſcontinues the eſtate tail, and gives the cognizee a baſe fee, that is, an eſtate to him and his heirs, as long as the tenant in tail has heirs of his body; but does not bar the rights of the perſons in remainder or reverſion.

But lets in the Reverſion. 1 Show. 370. 4 Mod. 1.

§ 41. Where the tenant in tail has the immediate reverſion in fee in himſelf, he may make a good title by fine only; for in that caſe the operation of the fine will be to merge the eſtate-tail, and bring the reverſion in fee into immediate poſſeſſion: it being determined that a fine takes away the protection given to eſtates-tail by the ſtatute *de donis*, and they then, like all other particular eſtates, become ſubject to merger and extinguiſhment, when united with the abſolute fee.

This method, however, of barring an eſtate-tail, is attended with one conſiderable inconvenience, which will be mentioned in a ſubſequent chapter.

Exceptions in the Statute 32 Hen. 8.

§ 42. There are two clauſes in the ſtatute 32 *Hen.* 8. c. 36. by which it is enacted, That it ſhall not extend

tend to any fine levied of any lordſhips, manors, &c. the owners whereof, by any expreſs words contained in any ſpecial act of parliament made ſince the 4 *Hen.* 7. are reſtrained from alienation; nor to any manors, lands, tenements, &c. then in ſuit, demand, or variance in any of the King's courts, or whereof any charters, evidences, or muniments, were then in demand in the Court of Chancery, &c. but all ſuch fines ſhould have the ſame force and effect as if that ſtatute had not been made. § 3 & 4.

§ 43. A fine has alſo an operation on eſtates-tail, in conſequence of the warranty which is always inſerted in it. Now, it has been ſtated in a former Title, that a collateral warranty is not prohibited by the ſtatute *de donis;* and in Mr. *Robinſon*'s book on *Gavelkind*, it is ſaid to be a common miſtake, that all collateral warranties are taken away by the ſtatute 4 & 5 *Ann.* c 16. whereas that ſtatute only makes void all warranties by tenants for life, and all collateral warranties made by any anceſtor, not having an eſtate of inheritance in poſſeſſion: ſo that if *A.* be tenant in tail, remainder to *B.* his next brother, which is a very common caſe, ariſing almoſt on every marriage-ſettlement, and *A.* being in poſſeſſion levies a fine, with warranty from him and his heirs, and dies without iſſue; this is a collateral warranty, for *B.*'s title is by way of remainder, to which his elder brother is collateral, which ſhall bar notwithſtanding the ſtatute, though no aſſets deſcend. Effect of the Warranty in a Fine, Tit. 32. ch. 4. ſ. 23. p. 125. note. Lit. ſ. 716.

TITLE XXXV.

FINE.

CHAP. X.

Of the Force and Effect of a Fine in barring particular Perſons, Eſtates, and Intereſts.

§ 2. *Parties.*
3. *Lay Corporations.*
4. *Married Women.*
23. *Truſt Eſtates.*
30. *Copyholds.*
35. *Terms for Years.*
41. *Eſtates held by Statute-Merchant, &c.*
44. *Deviſees.*
45. *Executors to whom Lands are given for Payment of Debts.*
46. *A Title of Entry for a Condition broken.*
51. *A Power appendant or in groſs.*
54. *But not a Power collateral to the Land.*
56. *Writ of Error.*

Section 1.

THE object of the ſtatute 4 *Hen.* 7. was not confined to the enabling tenants in tail to bar their iſſue, it was alſo intended to ſecure thoſe who were in poſſeſſion of land againſt all dormant claims; the words of the ſtatute being ſo extenſive, that they comprehend almoſt all perſons, and almoſt every kind of eſtate or intereſt in lands: and where a fine and non-claim is pleaded, a court of law will not enter into any diſcuſſion of the title until that be accounted for.

Driver v. Lawrence, 2 Black. Rep. 1259.

Parties.

§ 2. All thoſe who are parties to a fine are immediately barred, and have no time allowed them to claim,

claim, even though they labour under diſabilities, except in the caſe of infancy.

§ 3. Lay corporations, who have an abſolute eſtate in their poſſeſſions, and a power of alienation, may be barred by a fine and non-claim. Lay Corporations.

The cooks of *London*, who were incorporated by *Edward* 4. bargained and ſold a part of their lands in fee; the bargainee entered, and levied a fine with proclamations, and five years paſſed. Afterwards the bargain and ſale proved to be void, on account of a miſnomer in the corporation; and it became a queſtion, whether the corporation was bound by the fine and non-claim. It was determined that the corporation was barred by the fine, becauſe the ſtatute 4 *Hen.* 7. was made for the public good, and to ſettle and quiet men's inheritances: that therefore the words of it ought to be conſtrued in the moſt extenſive ſenſe, for the benefit of thoſe who were in poſſeſſion of lands, and for barring the rights of all perſons who were remiſs in making their claims: ſo that although the words of the ſtatute only extended to natural perſons and their heirs, and no mention was made of any corporation or ſucceſſors, yet it was the intention of the legiſlature, that it ſhould extend to ſuch corporations as had in themſelves an abſolute eſtate and power of alienation. Croft v. Howell, Plowd. 536.

Eccleſiaſtical corporations, however, are not barred by a fine and non-claim, as will be ſhewn hereafter.

Married Women.

§ 4. By the common law, a married woman could not, by joining with her huſband in any deed or conveyance whatever, bar herſelf or thoſe claiming under her, of any eſtate whereof ſhe was ſeiſed in her own right, or of that portion of her huſband's real property, which the law has provided for her ſupport in caſe ſhe ſurvives him*.

This rule, probably, aroſe from that principle of law, that the legal exiſtence of a woman is ſuſpended during the marriage, or, at leaſt, is incorporated or conſolidated into that of her huſband, or elſe from a fear that her huſband ſhould uſe any compulſion for the purpoſe of forcing his wife to part with her rights in his favour.

§ 5. But although a married woman was never bound by any deed or conveyance executed by her during the coverture, yet, if an action was brought againſt a huſband and wife for the recovery of any lands, whether the property of the huſband, or of the wife, and judgment was given againſt them, the wife was barred.

2 Inſt. 342. Thus, it appears, that, until the ſtatute of *Weſtm.* 2. even a judgment by default in a poſſeſſory action againſt

* There are two inſtances in *Madox Formulare Anglicanum*, N° 148. & 319. of feoffments, which are expreſſed to be made with the aſſent of the feoffor's wife. And Mr. *Reeves* (Hiſt. of the *Engliſh Law*, vol. i. p. 91.) ſuppoſes that the wife's claim of dower might, in thoſe days, be barred by ſuch aſſent, becauſe feoffments were then made publicly in court.

a huſ-

a huſband and wife, for the wife's freehold, was ſo far binding on her, that after her huſband's death, ſhe could only recover her eſtate, by bringing a writ of right. Now, a fine being an accommodation of a ſuit, and a concord being deemed to have the ſame force and effect as a judgment in a real action, it follows, that a married woman muſt have been as effectually bound by a fine as by a judgment in an adverſary ſuit. Nor was it thought neceſſary to give the wife a power of claiming lands, whereof ſhe and her huſband had levied a fine, becauſe, in that caſe, ſhe muſt have aſſented to it; whereas the huſband might have put in a feint plea, or let judgment go againſt him by default, without the conſent or even knowledge of his wife.

§ 6. Mr. *Hargrave*, to whoſe learned note on fines I am indebted for the preceding obſervations, has very properly ſuggeſted, that the common notion of a fine's owing its effect in barring married women, to their ſecret examination by the judges or commiſſioners, is incorrect. This remark is fully confirmed by a paſſage in *Glanville*, from which, it appears, that a married woman might appoint her huſband as her attorney to levy a fine for her *, in which caſe, it is highly improbable that ſhe ſhould have been examined: and from which, it may be concluded, that the private examination of a married woman was not a neceſſary

1 Inſt. 121. a. 1.

* "*Poteſt autem pater ita loco ſuo filium pro ſe ponere, et vice verſa,* "*extraneus quoque extraneum, uxor quoque maritum, cum quis itaque* "*maritus poſitus loco uxoris ſuæ in placito de maritagio, vel de dote* "*ipſius uxoris per judicium ſive per concordiam,*" &c. *Glanville*, lib. 2. c. 3. *Vide* alſo an authentic record, *ante* p. 80.

circumſtance

circumſtance at common law, and was poſſibly firſt preſcribed by the ſtatute *de modo levandi fines.*

§ 7. If a fine derived its efficacy in barring married women, from the circumſtance of their private examination, then that form might eaſily have been added to any other conveyance; but, by the common law, a bargain and ſale by a huſband, on which the wife is privately examined, does not bind her after the coverture is determined. It is, however, obſervable, that, by the cuſtom of *London*, and ſeveral other cities, a married woman may bar herſelf by a deed inrolled, in which ſhe is privately examined; and this cuſtom was confirmed in the reign of *Hen.* 8. by a poſitive ſtatute.

2 Inſt. 673. Keilw. 4 *a.*

Bohun's Priv. Lond. Bro. Ab. Tit. Cuſtom, pl. 39. Idem Tit. Fait. Iaroll. pl. 15. 34.35 Hen. 8. c. 22. Hob. 225.

§ 8. But whatever were the principles upon which this doctrine was originally founded, it is now fully ſettled, that a married woman, by joining her huſband in levying a fine, may bar herſelf and her heirs of all her eſtate and intereſt in any lands, whereof her huſband is ſeiſed in her right, notwithſtanding the ſtat. 32 *Hen.* 8. c. 28. And where a fine is levied by a huſband and wife, of lands which are the property of the wife, the whole eſtate paſſes from the wife, and the cognizee is in by her only; ſo that, if the fine is afterwards reverſed, the whole eſtate becomes again veſted in the wife *.

2 Rep. 57 *b.* Id. 77 *b.*

* It is ſaid *arguendo*, in Mr. *Douglas*'s *Reports* "That a huſ-"band is only named in a fine of his wife's eſtate for conformity; "for the fine is conſidered as the act of the wife, not of the huſ-"band, and the cognizee is in by her only; inſomuch, that if a "wife levies a fine without the concurrence of her huſband, and he "does not enter during the coverture, it will bar her after his death." *Doug.* 44.

§ 9. Where

§ 9. Where a fine is levied by a huſband and wife, of lands which are the eſtate of the wife, the warranty ſhould be from the huſband and wife, and the heirs of the wife. Roll. Ab. Tit. Fine, (O. 3.)

§ 10. A huſband and wife joined in exchanging lands which were the eſtate of the wife, with a ſtranger for other lands, and the exchange was executed. The huſband and wife aliened the lands taken in exchange, and levied a fine of them to the alienee. It was adjudged, that the wife might enter on her own lands after the death of her huſband, and that her joining in a fine of the lands taken in exchange, did not bar her from electing whether ſhe ſhould claim her own lands, or thoſe taken in exchange. Anon. 1 Leon. 285.

§ 11. A married woman may bind herſelf by a warranty in a fine *ſur conceſſit*, and an action of covenant will lie againſt her upon ſuch a warranty. Thus, where a huſband and wife levied a fine *ſur conceſſit* to *A.* for 99 years if he ſhould ſo long live, with a general warranty againſt all perſons during the ſaid term; the huſband died, and it was determined, that an action of covenant would lie againſt the wife upon the warranty. Wotton v. Hale, 1 Mod. 290. 2 Saund. 180.

§ 12. As a married woman may, by joining her huſband in a fine, make an abſolute alienation of her eſtate, ſo ſhe may alſo make a conditional one; and, therefore, if ſhe and her huſband mortgage her eſtate in this manner, it will bind her and her heirs. Reaſon v. Sacheverell, 1 Vern. 41.

§ 13. It

Glanv. l. 11. c. 3. 10 Rep. 49 *b.*

§ 13. It was formerly held that a married woman did not bar herſelf of her right to dower, by joining her huſband in a fine; becauſe, until the death of the huſband, the wife had no right of action: but the law is now entirely altered in this reſpect, as it has been long eſtabliſhed, that if a huſband and wife join in levying a fine of the huſband's eſtate, the wife is thereby barred from claiming her dower, out of the lands which are compriſed in the fine; becauſe ſhe having nothing in thoſe lands in her own right, her joining her huſband in a fine of them, could be for no other purpoſe than that of barring her from claiming dower; but a fine levied by the huſband alone does not bar his wife of dower.

Tit. 10. ch. 4. ſ. 17. 10 Rep. 49 *b.*

§ 14. Where a wife joins with her huſband in levying a fine of lands, whereof her huſband is ſeiſed in fee without any declaration of uſes, the uſe reſults to the huſband, and a new right to dower accrues to her. Thus it is laid down in *Lampet*'s caſe, that if a huſband and wife grant a rent by fine, or make a leaſe for years, rendering rent to the huſband and his heirs, and afterwards the wife recovers dower; ſhe ſhall hold it, charged with the rent, and with the term. In this caſe the wife, though ſhe joined her huſband in a fine was held dowable, ſubject only to the charges created by the fine, ſhe muſt therefore have been entitled to dower out of the eſtate that reſulted; for the uſes of the fine being declared to be, to create a rent, or a term of years, the reſidue of the uſe reſulted to the huſband, and the widow became dowable of that reſidue.

§ 15. In

§ 15. In a ſubſequent caſe it was held, that where huſband and wife joined in a fine, and the huſband alone declared the uſes of it, the wife was concluded of her right to dower, becauſe no contradiction of the wife appeared that ſhe did not agree to the uſes declared by the huſband alone.

Haverington's Caſe, Ow. 6.

Tit. 32. c. 14. f. 26.

It follows from this caſe, that a fine levied by huſband and wife without any declaration of uſes by either of them, would not bar the wife from claiming her dower. For although a fine will bar a widow from claiming dower againſt any perſon deriving under a ſufficient declaration of the uſes of ſuch fine, yet a fine will not have that effect in favour of the heir claiming by deſcent from the huſband, for he muſt admit that his anceſtor died ſeiſed, which will give the widow a title to dower.

§ 16. A woman may alſo bar herſelf of her jointure, by joining her huſband in levying a fine of it, provided it be made purſuant to the ſtatute 27 *Hen.* 8. and be a good bar of dower; becauſe the wife by accepting ſuch a jointure before marriage, barred herſelf of her right to dower, ſo that ſhe can claim nothing after her huſband's death but her jointure, which ſhe herſelf concurred in deſtroying by the fine. But if a jointure be ſettled on a woman after marriage (in which caſe it is no bar of dower) and ſhe joins her huſband in levying a fine of it, this will not prevent her from claiming dower out of any other lands whereof her huſband was ſeiſed during the coverture, becauſe the jointure being no bar of dower, the wife had

1 Inſt. 36 *b.*

Tit. 7. ch. 1. ſ. 25.

1 Inſt 36 *b.*
1 Bulſt. 173.
1 Leon. 285.
Dyer 358. pl. 49.

had her election on her husband's death, either to accept of the jointure, or to claim her dower, and therefore Lord *Coke* says, that a fine levied of her jointure before her time of election, is no bar to her right of electing dower, when her time of election does come.

§ 17. Notwithstanding these determinations, if it appears not to have been the intention of a husband and wife in levying a fine to bar the wife's jointure, it will not affect it in a Court of Equity.

Solly v. Whitfield, Rep. Temp. Finch. 227.

§ 18. Thus, where *A.* upon his marriage, in consideration of 500 *l.* portion, settled an annuity of 50 *l.* on his wife to be issuing out of particular lands; and afterwards *A.* and his wife joined in levying a fine of those lands to a mortgagee, who had notice of the annuity, which was excepted in the mortgage. It was contended that the wife had by this means extinguished her right to the annuity. But it appearing that it was not the intention of the parties to destroy this annuity, the court decreed that it should not be affected by the fine.

S. P. Naylor v. Baldwin, Rep. in Cha. 8vo. v. 1. 131.

Anon. Skinner 238. Brind v. Brind, 1 Vern. 213.

§ 19. So where a jointure was settled on a woman, issuing out of some houses in *London* which were burnt down; the woman joined her husband in a fine of the houses, to create a long term for raising money to rebuild them; and it was agreed that the woman should have her jointure out of the reserved rent of the houses. Adjudged that the fine did not affect this jointure.

§ 20. How-

§ 20. However, where a married woman joins her husband in a fine, it will not only bar her from claiming dower out of the lands compriſed in the fine, but will alſo bar her of any particular intereſt in thoſe lands.

§ 21. A man on his marriage entered into a bond for 600 *l.* to a truſtee with a warrant of attorney to confeſs judgment thereon, to be defeazanced on the payment of 300 *l.* to his wife if ſhe ſhould ſurvive him: the wife afterwards joined her huſband in a fine of all his lands. It was agreed that the fine not only barred the wife from claiming dower out of the lands, but alſo deſtroyed her intereſt in the judgment.

Goodrick v. Shotbolt, Prec. in Cha. 333. Gilb. Rep. 18.

§ 22. Every kind of fine with or without proclamations, and whether levied in the Court of Common Pleas or in an inferior court, will bar a married women; for fines derive this effect from the principles of the common law, and not from any ſtatute.

§ 23. A fine is a good bar to a truſt eſtate, as well as to a legal eſtate, becauſe the *ceſtui que truſt* has an equitable intereſt, and is therefore bound to purſue the proper remedies for ſecuring it: and if this were not the caſe, the operation of a fine would be much leſs extenſive than it is, as there are ſo many truſt eſtates now always exiſting. Thus, if *A.* is ſeiſed of the lands in truſt for *B.* and *C.* enters on theſe lands and levies a fine of them with proclamations; if five years paſs without any claim being made, this fine will

Truſt Eſtates. Clifford v. Aſhley, 1 Cha. Ca. 268. Saliſbury v. Bagot, 1 Cha. Ca. 278. 1 Freem. 311.

be

be a good bar both to *A.* who had the legal eſtate, and to *B.* who was the *ceſtui que truſt.*

§ 24. But with reſpect to equitable titles there is a diſtinction; for where the equity charges the lands only, a fine and non-claim is a good bar, but where it charges the perſon only in reſpect of the land, it is then no bar.

Gilb. Cha. 62. § 25. Thus, if a truſtee levies a fine of the lands whereof he is ſeiſed in truſt, to a perſon who has notice of the truſt, or if a man purchaſes from a truſtee, with notice, and levies a fine, the *ceſtui que truſt* will not be barred, becauſe the fine being levied to a perſon or by a perſon who has notice of the truſt, the land will continue ſubject to the truſt, and therefore the Court of Chancery will not permit the fine to be a bar; ſo that whenever a perſon is charged as claiming under a truſtee, he muſt either ſet up an oppoſite title, and deny his claiming under the truſtee, or elſe, if he does claim under a truſtee, he muſt ſet forth that he paid a valuable conſideration for the lands, and deny that he had any notice of the truſt.

2 Atk. 631. § 26. If the title is merely a legal one, and a man has purchaſed an eſtate which he ſees himſelf has a defect on the face of the deeds, yet the fine will be a bar, and will not affect the purchaſer with notice, ſo as to make him a truſtee for the perſon who had the right, becauſe (as Lord *Hardwicke* obſerves) this would be carrying it much too far, for the defect upon the face of the deeds is often the occaſion of the fine's being

being levied. It ſhould however be obſerved, that where a fine is levied by a truſtee or a perſon who has notice of the truſt, it is not void, nor is it ſet aſide, but the perſon to whom the fine was levied without conſideration, or with notice, becomes himſelf a truſtee for the real owner. Infra, ch. 14.

§ 27. Having examined in what caſes a *ceſtui que truſt* may be barred of his truſt eſtate by the fine of a ſtranger, it will alſo be neceſſary to enquire how far a fine levied by a *ceſtui que truſt* himſelf, is a bar of his truſt eſtate.

§ 28. Before the ſtatute of uſes, if a *ceſtui que uſe* had levied a fine, it might have been avoided at any time by the plea *quod partes finis nihil habuerunt*; as the *ceſtui que uſe* had no eſtate in the land, but was barely tenant at will to his feoffees. But modern Chancellors have very much altered the law in this reſpect, having laid it down as a general rule, that any legal conveyance or aſſurance by the *ceſtui que truſt*, ſhall have the ſame effect and operation on the truſt eſtate, as it would have had on the legal eſtate, if the truſtees had conveyed it to the *ceſtui que truſt*. So that now a *ceſtui que truſt* in tail may by a fine duly levied bar his iſſue as fully as if he had the legal eſtate: for otherwiſe truſtees by refuſing, or by not being capable of executing their truſt, might prevent the tenant in tail from executing the power given him by the law over his eſtate, which would be extremely inconvenient, and would tend to the introduction of perpetuities. Year Book. 27 Hen. 8. 20. Bro. Ab. Tit. Fine, pl. 4. 1 Cha. Ca. 213. Caſes temp. Talbot 43.

Baſket v. Peirce, 1 Vern. 226. 2 Ab. Eq. 473.

§ 29. A *ceſtui que truſt* in tail may not only bar his own iſſue by a fine, but alſo the perſons in remainder or reverſion, unleſs they make their claim within the time ſpecified by the ſtatute.

Copyholds.

§ 30. We have ſeen that a copyholder cannot implead or be impleaded for his copyhold in the King's Courts, and therefore cannot levy a fine of it in the Court of Common Pleas: but notwithſtanding this principle, a copyhold eſtate is conſidered as an intereſt within the ſtatute 4 *Hen.* 7. and therefore may be barred by a fine, levied by the perſon who has the freehold of the land.

Co. Cop. f. 55.

§ 31. Thus, if a copyholder be diſſeiſed, and the diſſeiſor levies a fine with proclamations, both the lord of the manor and the copyholder will be barred, if they do not make their claim in due time. So if a copyholder makes a feoffment in fee, and the feoffee levies a fine with proclamations, and five years paſs without any claim, the lord of the manor will be barred.

Margaret Prodger's Caſe, 10 Rep. 104.

§ 32. There is a cuſtom in moſt manors that a copyhold may be entailed, but even if a fine were allowed to be levied in the court of the manor whereof ſuch copyhold is held, it will not bar ſuch an intail, becauſe it is not levied purſuant to the ſtatute 4 *Hen.* 7. unleſs it is allowed by the cuſtom to have that effect.

Tit. 37. c. 2.

§ 33. Terms

§ 33. Terms for years may be barred by a fine and non-claim, if the leſſees were or ever might have been in poſſeſſion. Terms for Years.

§ 34. Thus where a leaſe for years was made of certain lands, to begin after the determination of a leaſe then ſubſiſting; the firſt term expired, the ſecond leſſee neglected to enter, and the perſon in reverſion entered, made a feoffment, and levied a fine with proclamations of the lands. Five years paſſed without any claim being made by the ſecond leſſee, and the queſtion was, whether he was barred by the fine. It was reſolved, that although a leſſee for years had not himſelf ſuch an eſtate as would enable him to levy a fine, yet it did not therefore follow that his intereſt ſhould not be barred by a fine; that a term for years was within the ſtatute 4 *Hen.* 7. being comprehended under the word *intereſt*, and as the object of that act was to prevent ſtrifes and debates, it would not have that effect, if its operation did not extend to long terms for years, which are now ſo common. Saffyn's Caſe, 5 Rep. 123. Cro. Jac. 60.

§ 35. This principle was carried ſo far, that where a perſon who had a long term for years, aſſigned it over to a truſtee in truſt for himſelf, then purchaſed the freehold and inheritance of the lands, and levied a fine: it was reſolved that the term was barred, the aſſignee of it having ſuffered five years to paſs without making any claim. Mr. Juſtice *Ventris* has taken notice of this caſe, and obſerved, that the cognizee of the fine, who was alſo the purchaſer of the freehold, did not know of the term, or that it was held in truſt Iſcham v. Morrice, Cro. Car. 109. 2 Vent. 329.

for him; ſo that if the fine had not barred it, he would have been cheated. But that where a term is aſſigned in truſt for the perſon who is ſeiſed of the inheritance, and who is in poſſeſſion, a fine levied by him will not deſtroy the term, becauſe the owner of the inheritance is, in caſes of that kind, tenant at will to his truſtee; and this rule has ever ſince been adhered to: ſo that it is now a ſettled principle, that terms for years, which are kept on foot by purchaſers, for the purpoſe of protecting the inheritance, are not barred by a fine, otherwiſe fines would frequently weaken the intereſt of purchaſers, inſtead of adding to their ſecurity.

1 Lev. 272. 1 Vent. 82. Sid. 460. 3 Keb. 564. Duke of Norfolk's Caſe, 3 Ch. Ca. 1.

§ 36. A term which is veſted in truſtees on any particular truſt (except that of protecting the inheritance) may alſo be barred by a fine and non-claim.

Thus, where *A.* had a term for years veſted in him for ſecuring children's portions, *B.* being in poſſeſſion, levied a fine, and five years paſſed without any claim being made. It was reſolved by the Court of King's Bench, that, admitting the term was in truſt, it was barred by the fine.

Hanmer v. Eyton, Comb. 67. 1 Cha. Rep. 27. 33.

§ 37. If a perſon makes a leaſe for years, and ſtill continues in poſſeſſion, he is conſidered as tenant at will to the leſſee for years, and if the leſſor being thus in poſſeſſion, levies a fine, it will be no bar to the term for years, becauſe the poſſeſſion of the tenant at will being the poſſeſſion of the perſon in remainder, his intereſt is not diveſted; and it will be ſhewn in a ſubſequent part

part of this work, that no eſtate is barred by a fine, unleſs it be deveſted out of the real owner. Ch. 13.

§ 38. Thus, where a perſon who was ſeiſed in fee, for the continuance of his eſtate in his name and family, made a leaſe for 500 years in truſt that he himſelf ſhould receive the profits during his life, and that afterwards his brother ſhould receive them. Some time after the leſſor being in poſſeſſion according to the truſt, covenanted with other truſtees for the ſame conſiderations, to ſtand ſeiſed of thoſe lands to the uſe of himſelf for life, remainder to the uſe of his brother, &c. And that the ſaid leaſe, and all other eſtates made or to be made by him, ſhould be and enure to the ſame uſes, and then levied a fine. A queſtion aroſe, whether the term for 500 years was barred by the fine and non-claim. Sir *Matthew Hale* obſerved, that nothing had been done in this caſe whereby the eſtate of the leſſee was deveſted or diſplaced; for the leſſor continuing in poſſeſſion, by permiſſion of the leſſees, as muſt be preſumed, he was only tenant at will to the leſſees, and therefore his fine had no operation: beſides there was a privity between the leſſor and leſſee, which prevented the fine from operating as a bar to the term. No judgment appears to have been given in this caſe; but in another which was exactly ſimilar, it was determined that a fine was no bar to a term of this kind. Focus v. Saliſbury, Hard. 400. Corbet v. Stone, Sir T. Raym. 140.

§ 39. If a perſon who has made a leaſe to truſtees, and has ſtill continued in poſſeſſion, makes another leaſe of the ſame lands, and levies a fine to confirm

it, the firſt leaſe will be deveſted by the ſecond; ſo that it will then be barred by the fine and non-claim.

Freeman v. Barnes, 1 Vent. 55. 1 Lev. p. 1. 270.

§ 40. The Marquis of *Wincheſter* made a leaſe for a hundred years, in truſt to attend the inheritance, and the leſſee entered. The Marquis afterwards made a leaſe for fifty-four years, and, to confirm it, levied a fine with proclamations. The leſſee for fifty-four years entered; and the leſſee for a hundred years being out of poſſeſſion, aſſigned his term to the plaintiff. The queſtion was, whether the fine and non-claim barred the term of a hundred years? It was adjudged that the Marquis, when he entered after he had made the leaſe for a hundred years, was tenant at will; but that he had deveſted that term by making the ſubſequent leaſe for fifty-four years; for it was in the power of the Marquis either to deveſt the term of a hundred years or not, and he had made his election by levying the fine; ſo that the term for a hundred years, being thus deveſted by the leaſe for fifty-four years, was barred by the fine. But in this caſe all the judges agreed, that terms for years, kept on foot by purchaſers to protect their eſtates, ſhould not be barred by a fine and non-claim.

Eſtates held by Statute Merchant, &c. 2 Inſt. 517. 5 Rep. 124.

§ 41. Eſtates held by ſtatute merchant, ſtatute ſtaple, and elegit, are comprehended within the ſtatute 4 *Hen.* 7. and may therefore be barred by a fine and non-claim, provided the lands be extended.

Ognell v. Lord Arlington, 1 Mod. 217.

§ 42. Thus, upon a trial at bar, the court delivered it as law to the jury, that where lands were actually extended

extended on a writ of elegit, the tenant by elegit might be barred by a fine and non-claim; and that if an inquiſition upon an elegit be found, the party has the poſſeſſion before entry, and may bring an ejectment, or action of treſpaſs.

§ 43. So in the caſe of *Deighton* v. *Grenville*, which will be ſtated in the next chapter, all the judges agreed, that although the cognizees of ſtatutes merchant did not enter, yet that they had poſſeſſion in law, in conſequence of their extents and *liberates*, which gave them a right of enty, and therefore they might be barred by a fine.

§ 44. The eſtate of a deviſee may be barred by a fine and non-claim, if the deviſee has not entered. Deviſees.

Thus where *John Metcalf* deviſed lands to *John Gallant*, an infant of the age of three years, in fee. The ſon and heir of *John Metcalf* entered on the lands, and levied a fine of them. *John Gallant* the infant died before he attained his full age, leaving a ſiſter, who was then married. The court were of opinion that the ſiſter muſt make her claim within five years after the death of her huſband, otherwiſe the fine would bar her. Hulm v. Heylock, Cro. Car. 209.

§ 45. Executors to whom lands are deviſed for payment of debts, may alſo be barred by a fine levied of the lands thus deviſed, if they do not make their claim in due time. Executors to whom Lands are given for Payment of Debts. 5 Rep. 124 *a*.

A Title of Entry for a Condition broken.

§ 46. A title of entry for a condition broken, may be barred by a fine levied by the grantee or deviſee of the conditional eſtate.

Mayor of London v. Alsford, Cro. Car. 575. 1 W. Jones, 452.

§ 47. Thus, where lands were deviſed to truſtees and their heirs, upon condition that they ſhould pay a certain ſum of money every year for the ſupport of a ſchool-maſter, *&c.* and, on non-performance of the truſts, the lands were deviſed over to other perſons. The truſtees neglected to perform the truſts, and levied a fine of the lands. It was determined that the fine was a good bar to the perſons who had a title to enter on breach of the condition.

Shep. Tou. 154.

§ 48. A title of entry for a condition broken may alſo be barred by a fine levied by the grantor of the conditional eſtate; as if a perſon makes a feoffment on condition, and before the condition is broken, the feoffor levies a fine of the ſame lands, either to the feoffee or to any other perſon, the condition will be thereby diſcharged for ever. But if the fine was levied for the purpoſe of corroborating the conveyance by which the condition was created, it will not deſtroy the condition; for in that caſe the fine and conveyance will be conſtrued together, and will operate as one aſſurance.

Cromwell's Caſe, 2 Rep. 69.

§ 49. It ſeems that a right or title of entry on any other account may alſo be barred by a fine.

Thomaſin v. Mackworth, Carter 75.

§ 50. Thus, where *Humphrey Mackworth* was ſeiſed to him and his heirs, provided that if 100*l.* was not paid

paid within three months after the birth of a child, the truſtees ſhould enter. The money was not paid; ſo that the eſtate of *Humphrey* being with a *quouſque*, ceaſed, but the truſtees did not enter. *Humphrey* conveyed away the lands by leaſe and releaſe, and levied a fine; after which five years paſſed. Lord Chief Juſtice *Bridgeman* delivered the opinion of the court, that the entry of the truſtees was barred by the fine.

§ 51. A power appendant, or in groſs, may be barred by a fine levied of the lands to which the power relates, by the perſon to whom ſuch power is reſerved; becauſe by the fine, the perſon acknowledges all his right and intereſt in the lands to be veſted in another; and therefore it would be repugnant to that acknowledgment that he ſhould ever afterwards claim any power over thoſe lands. Beſides a power appendant or in groſs, being part of the old dominion, is conſidered as an intereſt which may be releaſed.

A Power appendant, or in groſs. 1 Inſt. 237 *a.* 3 Rep. 83 *a.*

Chriſtopher Digges being ſeiſed in fee, covenanted to ſtand ſeiſed to the uſe of himſelf for life, remainder over, reſerving to himſelf a power of revocation, by deed indented and inrolled. *Chriſtopher Digges* revoked the uſes, but, before the deed of revocation was inrolled, he levied a fine. It was reſolved that the fine being levied before the inrollment of the deed of revocation, until which time the revocation is imperfect, had deſtroyed the power.

Digges's C. 1 Rep. 173.

§ 52. A power

1 Inſt. 215 *a.* Shep. T. 501.

§ 52. A power of revocation may alſo be deſtroyed in part, by levying a fine of part of the land, and yet the power will continue good as to the reſidue.

§ 53. If a perſon who has a power appendant, or in groſs, levies a fine of the lands to which the power relates, and afterwards by deed declares that ſuch fine ſhall enure as an execution of his power, the fine and declaration of uſes will in that caſe be conſidered as one aſſurance, and will not deſtroy the power.

Herring v. Brown, 2 Show. 185. 1 Vent. 368. Carth. 22. Comb. 11. Skin. 184. 1 Freem. 486.

Sir *J. Williams* being ſeiſed in fee, made a voluntary ſettlement to the uſe of himſelf for life, remainder to his brother Sir *M. Williams* in tail, reſerving to himſelf a power of revocation. Some time afterwards, Sir *J. Williams* levied a fine, and by a deed made between him, his brother Sir *M. Williams* and others, bearing date a month after the fine was levied, reciting the fine, it was declared, that at the time of levying the ſaid fine, the agreement of all the parties to the deed was, that it ſhould enure to the uſe of Sir *J. Williams* and his heirs. It was objected that Sir *J. Williams* by levying this fine, without any precedent declaration of the uſes to which it ſhould enure, had deſtroyed his power of revocation, and forfeited his eſtate for life; for the deed being ſubſequent to the fine, was ineffectual, becauſe there was an intermediate time between the levying of the fine and the execution of the deed, in which the forfeiture attached, and the power was deſtroyed; ſo that no ſubſequent act could purge the forfeiture which once attached, nor revive the power which was deſtroyed; for theſe reaſons, and upon the authority

authority of *Digges*'s caſe, it was adjudged in the Court of King's Bench, that Sir *J. Williams* had, by levying the fine, deſtroyed his power of revocation, and therefore that the ſubſequent declaration of uſes was void.

On a writ of error to the Exchequer Chamber, this judgment was reverſed by the opinion of ſix Judges againſt two; it being determined that the fine and declaration of uſes were to be conſidered as one and the ſame conveyance, and operated as an execution, and not as an extinguiſhment of the power. It was agreed that a fine alone, without a deed to declare the uſes of it, would have extinguiſhed the power, but that it was otherwiſe where there was a deed declaring what the intention of the parties was when the fine was levied; and although the date of the deed was ſubſequent to that of the fine, (for no other reaſon, perhaps, but becauſe the fine was levied in the vacation, and was dated as of the preceding term), ſtill it was poſſible that the deed was executed at the time the fine was acknowledged; ſo that it would be unreaſonable to make a forfeiture or extinguiſhment of a right merely by relation, which is but a fiction of law.

This doctrine has been confirmed by the Court of King's Bench, in the caſe of *Doe*, on the demiſe of *Odiarne* v. *Whitehead*, which will be ſtated in a ſubſequent chapter: ſo that now whenever a fine is levied, and a declaration of the uſes of it is afterwards executed, the fine and declaration of uſes will be conſidered as one aſſurance. Douglas 45. S. P.

§ 54. A power

But not a Power collateral to the Lands. 1 Inſt. 237 *a.*

§ 54. A power collateral to the land, which is not joined with an intereſt, cannot be deſtroyed by a fine, levied by the perſon to whom ſuch a power is reſerved; becauſe it is conſidered but as a bare and naked authority, which cannot be releaſed or deveſted.

1 Rep. 174 *a.*

Thus, it is ſaid by Lord Chief Juſtice *Popham*, in *Digges*'s caſe, that if a feoffment was made to *A.* in fee to divers uſes, with a proviſo that it ſhould be lawful for *B.* to revoke thoſe uſes; *B.* could not in that caſe revoke his power, nor extinguiſh or deſtroy it by a fine, becauſe it was a collateral power; for the land did not move from him, nor would the party have been in by him, if he had executed the power.

§ 55. It follows from the ſame principles that a collateral power cannot be barred by the fine of a ſtranger.

Willis v. Shorrall, 1 Atk. 474.

Thus where a perſon by a proviſo in his marriage-ſettlement, gave his wife a power to diſpoſe of 100 *l.* to ſuch perſons as ſhe ſhould appoint, to be paid within one year after his deceaſe; and in default of payment, one *John Moreton* was empowered to make a leaſe of certain lands to raiſe that ſum; the wife, in a year after the death of her huſband, made an appointment of the 100 *l.* but it was not paid; the heir of the huſband levied a fine of the land, and five years paſſed, and afterwards the appointees of the 100 *l.* brought their bill to be paid that ſum.

Lord

Lord *Hardwicke* obſerved, that though by the ſeveral ſtatutes relating to fines, all right, claim, and intereſt, which ſtrangers had, were barred by a fine, yet that ſuch a ſtranger as *John Moreton*, who had no intereſt, but only a bare naked power, and who could not have made an entry, was not affected by it.

§ 56. A fine and non-claim is a good bar to a writ of error, in conſequence of the word *actions* in the ſecond ſaving of the ſtat. 4 *Hen.* 7. and a fine is alſo a good bar to a writ of error to reverſe a common recovery.

Writ of Error. Bartholomew v. Belfield, Cro. Jac. 332.

TITLE XXXV.

FINE.

CHAP. XI.

Of the different Savings in the Statute 4 Hen. 7. and the Exceptions in favour of Infancy, Coverture, &c.

§ 1. *Of the Firſt Saving.*
3. *Of the Second Saving.*
17. *Of Perſons having different Rights.*
§ 29. *Of the Exceptions in favour of Infancy, &c.*
40. *Caſe of Perſons dying under their Diſabilities.*

Section 1.

Of the Firſt Saving.

THE great inconveniencies which aroſe from the ſtatute of non-claim, were removed by the ſtatute 4 *Hen.* 7., and a proper medium was eſtabliſhed between the unbounded latitude given by the former of thoſe ſtatutes, and the rigour of the common law; for the doctrine of non-claim was reſtored, but the time allowed for making the claim was extended from one to five years.

4 Hen. 7. c. 24. ſ. 3.

The words of this clauſe, which is called the firſt ſaving, are, "and ſaving to every perſon and perſons, "and to their heirs, other than the parties to the ſaid "fine, ſuch right, title, claim, and intereſt, as they "have to or in the ſaid lands, tenements, or hereditaments, at the time of ſuch fine engroſſed, ſo that "they purſue their title, claim, or intereſt, by way of "action

"action or lawful entry within five years next after the "same proclamations had and made."

§ 2. In conſequence of this clauſe, it follows, that all thoſe who have any preſent right or claim to lands whereof a fine is levied, are allowed five years, to be counted from the day on which the laſt proclamation was made to make their claim, and although there be no tranſmutation of poſſeſſion, and the cognizor be in of the old uſe, yet, after five years, it will operate as a bar to all claims whatever. If, therefore, a tenant in tail is diſſeiſed, and the diſſeiſor levies a fine with proclamations, the tenant in tail having a preſent right, may defeat the fine at any time within five years after the laſt proclamation has been made. But if he neglects to make his claim within that time, he will be for ever barred by the fine; and if the tenant in tail dies before the five years are expired, his iſſue will not be allowed a new period of five years to make his claim, but only ſo much of the five years as was not paſſed in the life-time of his anceſtor. With reſpect to the mode of avoiding a fine within the term preſcribed by the ſtatute, it will be pointed out in a ſubſequent chapter.

Shep. Tou. 30.

2 Wilſ. Rep. 19.

Shep. T. 30. 3 Rep. 87 *b.*

Ch. 14.

§ 3. By the common law, perſons in remainder and reverſion were frequently barred by the neglect of the particular tenant to make a claim within a year and a day after the fine was levied; and this is commonly aſſigned as the only reaſon for making the ſtatute of non-claim; but caſes of this kind are particularly provided for by the following clauſe in the ſtatute 4 *Hen.* 7.

Of the Second Saving.

4 Hen. 7. c. 24. f. 4.

which is uſually called the ſecond ſaving: "And alſo "ſaving to all other perſons ſuch action, right, title, "claim, and intereſt in or to the ſaid lands, tenements, "or other hereditaments as ſhall firſt grow, remain, "or deſcend, or come to them, after the ſaid fine en- "groſſed and proclamations made, by force of any "gift in tail, or by any other cauſe or matter had and "made before the ſaid fine levied, ſo that they take "their action, or purſue their ſaid right and title ac- "cording to law, within five years next after ſuch "action, right, claim, title, or intereſt to them ac- "crued, deſcended, fallen, or come."

§ 4. In conſequence of this clauſe, all thoſe to whom a right firſt accrues, at any time after a fine has been levied, are allowed five years, to be computed from the day on which their right firſt accrued to make their claim.

3 Rep. 87 *a.* & *b.* Plowd. 374.

§ 5. Thus, if a tenant in tail makes a feoffment, and the feoffee levies a fine, the iſſue in tail is within the ſecond ſaving, and ſhall have five years from the death of his father to make his claim and avoid the fine; becauſe he is the firſt to whom a right accrued and deſcended after the fine was levied, for his father could not enter againſt his own feoffment.

Penyſton v. Lyſter, Cro. Eliz. 896.

§ 6. In the ſame manner, if a tenant in tail bargains and ſells his eſtate tail to a ſtranger in fee, who levies a fine of it with proclamations, the iſſue in tail is within the ſecond ſaving, becauſe the right firſt accrued to him,

him, as his father could not enter againſt his own bargain and ſale.

§ 7. No perſon, however, is within the ſecond ſaving, but he to whom the right of avoiding the fine firſt accrued; ſo that thoſe who claim under the perſon to whom ſuch right accrued, are only allowed ſo much of the five years as have not elapſed in the life-time of their anceſtor.

§ 8. Thus, it is laid down by *Dyer* and *Catline*, that if a tenant in tail be diſſeiſed, and the diſſeiſor levies a fine, the right of reverſing the fine firſt accrues to, and attaches in the tenant in tail himſelf, ſo that, if he lets five years paſs without impeaching the fine, and then dies, his iſſue will be for ever barred, for they are not within the ſecond ſaving, becauſe the right firſt accrued to their anceſtor, and not to them. The Juſtices, *Southcote* and *Weſton*, diſſented from this opinion; and contended, that every iſſue in tail ſhould have five years, as a new right came to every one of them *per formam doni*; which right, as they took it, the makers of the act intended to preſerve, and to this purpoſe the words, by force of any gift in tail, were put in the ſecond ſaving. But this opinion was utterly diſallowed by the ſaid Chief Juſtices, who ſaid that the word *firſt*, which ought to be added to the word *deſcend*, and then it would be, *ſhall firſt deſcend*, will not ſuffer every deſcent to have five years.

Plowd. 374. 3 Rep. 87 *b.* Cro. Eliz. 896.

9. If a tenant in tail, either of a legal or a truſt eſtate, levies a fine, and five years paſs, and afterwards the

Plowd. 374. T. Raym. 151.

tenant in tail dies without iſſue, the perſons in remainder or reverſion are within the ſecond ſaving, and have therefore five years to make their claim, from the death of the tenant in tail without iſſue, becauſe their right did not accrue until the determination of the eſtate tail.

Shep. T. 33. § 10. If a tenant in tail diſcontinues his eſtate, reſerving a rent, and dies, and the iſſue in tail accepts of rent from the diſcontinuee, who afterwards levies a fine with proclamations, the acceptance of the rent by the iſſue in tail bars him from claiming the eſtate tail; but, upon the death of the iſſue in tail, his iſſue will have five years to avoid the fine, in conſequence of the ſecond ſaving, becauſe he was the firſt perſon to whom the right of reverſing the fine accrued.

Ante ch. 5. ſ. 38. § 11. In conſequence of the ſtatute 32 *Hen.* 8. c. 28. which has been ſtated in a former chapter, a fine levied by a huſband alone, of any lands which are the freehold and inheritance of the wife, ſhall not make any diſcontinuance, or be prejudicial to the wife or her heirs, but ſhe or they may enter on the lands and defeat ſuch a fine. Although the words of this act are very general, yet, if the huſband levies a fine with proclamations, and five years paſs after his death, without any entry or claim by the wife, ſhe will not only be barred of her entry, but alſo of her right; for the object of the ſtatute was only to provide againſt the diſcontinuance, which was a grievance peculiar to married women, but not to invalidate fines duly levied, as to married women, they having a remedy in common with others by entry or claim to avoid the fine. Beſides, though the words

8 Rep. 72 *b.* Dyer 72 *b.* 224 *a.*

words of the ſtatute are general, "that ſuch a fine "ſhall not be prejudicial to the wife or her heirs," yet the following words, *viz.* "but that ſhe may lawfully "enter according to her right and title therein, are "explanatory, and allow her an entry only in ſuch "caſes where ſhe had a right before the ſtatute."

§ 12. If a married man levies a fine of his own inheritance, and five years paſs, his wife is not thereby barred of her dower, but is within the ſecond ſaving of the ſtatute, and will be allowed five years from the death of her huſband to make her claim, becauſe her title to dower did not accrue until that period. *Plowden* was of opinion, that, in a caſe of this kind, the wife was not bound to make her claim within five years after the death of her huſband, but might claim her dower at any indefinite period of time; Lord *Coke* ſays the contrary was expreſsly determined in 4 *Hen.* 8., and that determination has ever ſince been held to be good law.

Plow. 373 *a.*

2 Rep. 93 *a.* Damport v. Wright, Dyer 224 *a.* 9 Vin. Ab. 245.

§ 13. If the wife's title to dower does not accrue at the death of her huſband, but commences at a ſubſequent period, ſhe will be allowed five years from the time when it accrued.

§ 14. A married man levied a fine with proclamations, and was afterwards indicted and outlawed for high treaſon. Some years after his death, his heirs reverſed the outlawry by writ of error, and then the wife claimed her dower. It was reſolved, that although more than five years had elapſed ſince the death of the

Menvill's Caſe, 13 Rep. 19. 2 Hawk. P. C. c 49. ſ. 44.

huſband, yet the fine was no bar to her, becauſe, as long as the attainder for treaſon ſtood in force, ſhe could not claim her dower; but as ſoon as the outlawry was reverſed, a title to dower firſt accrued to her, and therefore ſhe was within the ſecond ſaving, and had five years from the reverſal of the outlawry to purſue her right.

§ 15. If there be no perſon who has a right to make a claim, at the time when a fine is levied, and, afterwards, ſome perſon does acquire ſuch a right, he will be allowed five years from the time when he acquired the right of avoiding the fine to make his claim.

Stanford's Caſe, cited Cro. Jac. 61.

§ 16. Thus, where a perſon who was entitled to a term for years in reverſion expectant on another term for years died; the firſt term expired, the leſſors entered and levied a fine with proclamations. Five years paſſed before adminiſtration was granted of the effects of the perſon who had the reverſionary term. It was reſolved, that the adminiſtrator was within the ſecond ſaving of the ſtatute, and ſhould have five years to purſue his right from the time adminiſtration was granted, becauſe, until then, there was no perſon who could claim.

Of Perſons having different Rights. Sacp. T. 34.

§ 17. Strangers to fines, having ſeveral diſtinct rights, by ſeveral titles, accruing at different times, ſhall have ſeveral periods of five years allowed them to avoid a fine; that is, five years after the accruing of each title; ſo that, if a right accrues to a ſtranger when a fine is levied, which he neglects to purſue within the limited time,

time, and another right accrues to the ſame ſtranger at any time after, he is then comprehended within the ſecond ſaving of the ſtatute, as to the new right, upon the principle that, *quando duo jura in una perſona concurrunt æquum eſt ac ſi eſſent in diverſis.* This conſtruction is certainly not conſiſtent with the letter of the ſtatute, for, in conſequence of the words "other perſons," it appears clearly to have been the intention of the ſtatute, that no perſon who was comprehended in the firſt ſaving, ſhould take advantage of the ſecond; and, in the caſe of *Stowell* v. *Zouch*, *Dyer* contended that this was the true conſtruction of the ſtatute; but, however, the law has always been held to be otherwiſe.

9 Rep. 105 *b.* Plowd. 372.

Cro. Eliz. 222.

§ 18. Tenant for life levied a fine to a ſtranger, and the perſon in reverſion neglected to enter within five years after the fine was levied; afterwards, the tenant for life died. It was determined, that the reverſioner ſhould have another period of five years from the death of the tenant for life, to make his claim, for, in this caſe, two diſtinct rights accrued to him; the firſt, upon the forfeiture, which the tenant for life committed by levying the fine, and the ſecond, upon the death of the tenant for life.

Laund. v. Tucker, Cro. Eliz. 254. 3 Rep. 78 *b.*

§ 19. It is laid down by Lord *Coke*, that if a leſſee for years is ouſted, and the perſon in reverſion diſſeiſed, and the diſſeiſor levies a fine with proclamations, both the leſſor and leſſee are barred, if they do not make their claim within five years after the fine has been levied, and the leſſor will not be allowed another period

9 Rep. 105 *b.*

of five years after the expiration of the term, to make his claim; becauſe the leſſor might have brought an aſſize or other real action, immediately after the fine was levied; and, being thus comprehended within the firſt ſaving, he cannot take advantage of the ſecond. This doctrine has, however, been ſince contradicted, and is not now held to be law.

Fermor's Caſe, 3 Rep. 77. 2 And. 176. Jenk. 253.

A leſſee for 21 years, who was ſeiſed in fee of other lands in the ſame manor, made a leaſe for life of all the lands, and levied a fine with proclamations of as many meſſuages, &c. as comprehended not only the lands whereof he was ſeiſed in fee, but alſo the lands which he held for years; the leſſee continued in poſſeſſion, and paid his rent. Upon the expiration of the term, the leſſee claimed the inheritance of the land which he had held by leaſe, and would have barred the leſſor, by means of the fine and non-claim, but it was determined by all the judges, that the leſſor ſhould have a new period of five years from the expiration of the term, to make his claim and avoid the fine.

2 Vent. 334.

§ 20. This determination is ſaid, by Lord *Coke*, to have been founded on the circumſtances of fraud which appeared in the caſe, the principal of which was, that the leſſee continued in poſſeſſion after he had levied the fine and regularly paid his rent, ſo that the leſſor could have no notice that a fine had been levied of his lands.

2 Vent. 242.

But, in other books, the judgment is ſaid not to have been founded on the fraud which appeared in the caſe, but upon the conſtruction of the ſtatute; and the doctrine, that where a leſſee for years makes a feoffment, and

and then levies a fine, the leſſor need not make his claim within five years after the fine has been levied, but is allowed another period of five years from the determination of the term, was finally eſtabliſhed in the following caſe.

§ 21. A leſſee for years made a feoffment, and then levied a fine; five years paſſed, and the queſtion was, whether the leſſor was barred by his non-claim during the five years which elapſed immediately after the fine was levied, or ſhould be comprehended within the ſecond ſaving of the ſtatute 4 *Hen.* 7. and be allowed another period of five years from the expiration of the term. The court reſolved, that the leſſor ſhould have five years from the expiration of the term to avoid the fine, in the ſame manner as if a leſſee for life had levied a fine; the caſes being exactly ſimilar.

Whaley v. Tancred, 1 Vent. 241. T. Raym. 219. 1 Atk. 571. S. P.

§ 22. No perſon who is within the firſt ſaving of the ſtatute 4 *Hen.* 7. can be comprehended within the ſecond ſaving, unleſs the ſecond right which accrues to him is different from the firſt; for, if it is only the ſame right which accrues a ſecond time, the non-claim for five years after the right firſt accrued, will be a good bar,

§ 23. A tenant in tail made a leaſe for three lives, which was not warranted by the ſtatute 32 *Hen.* 8. c. 28. He then levied a fine, and died without iſſue. Five years paſſed without any claim, but on the expiration of the leaſe, the perſon in remainder entered. The court reſolved, that he was barred by his non-

Salvin v. Clerk, Cro. Car. 156. W. Jones 211.

claim during the five years which elapſed immediately after the fine was levied, and ſhould not have a new period of five years after the death of the leſſee, becauſe he had no other title after his death than he had before, for his title aroſe upon the death of the tenant in tail without iſſue, when he might have brought his formedon.

§ 24. If lands are extended on two ſtatutes, and the perſon who is ſeiſed of the land levies a fine, it diveſts the eſtates of the cognizees of ſuch ſtatutes, and the cognizee of the firſt ſtatute muſt make his claim within five years after the fine has been levied, otherwiſe he will be for ever barred. But, with reſpect to the cognizee of the ſecond ſtatute, he need not make his claim until ſatisfaction has been entered upon record on the firſt ſtatute, becauſe that is the only proper determination of an extent; ſo that he will have five years allowed him from that time to avoid the fine, by the ſecond ſaving in the ſtatute 4 *Hen.* 7., becauſe, until then, his right did not accrue.

Deighton v. Grenville, 2 Vent. 333. 1 Show. 36. 1 Skin. 360.

§ 25. *Thomas Lewis* being ſeiſed in fee of the premiſes in queſtion, acknowledged a ſtatute for 1,200 *l.* to *William Knight*; he afterwards acknowledged another ſtatute for 1000 *l.* to *Richard Gerrard*, and another for 5000 *l.* to Sir *James Elwes* and *Richard Burrows*; execution was ſued out on all theſe ſtatutes, and the lands were extended. *Thomas Lewis*, being in actual poſſeſſion, ſold the lands for 4000 *l.* to *John Lewis*, and levied a fine of them with proclamations. *John Lewis* deviſed the lands to his brother *Edward Lewis*,

Lewis, and the heirs male of his body, and, for want of ſuch iſſue, to his own two daughters. *John Lewis* died, and *Edward Lewis* being in actual poſſeſſion, levied a fine with proclamations, to the uſe of himſelf and his heirs, and died without iſſue, whereby the lands deſcended to the two daughters of *John Lewis*, who entered, and having married the Earls of *Huntingdon* and *Scarſdale*, they alſo entered, and were ſeiſed in right of their wives. Adminiſtration to *Burrows*, the ſurviving cognizee of the laſt ſtatute, was committed to *Ann*, wife of the defendant *Grenville*, as to that ſtatute and the extent thereon; and *Grenville* and his wife, who was alſo adminiſtratrix to *Gerrard* the cognizee of the ſecond ſtatute, having acknowledged ſatisfaction upon it, and cauſed it to be vacated, entered upon the Earls of *Huntingdon* and *Scarſdale*, as adminiſtratrix to *Burrows*, in whom the laſt ſtatute was veſted, and claimed the money due on it, whereupon, the ſaid Earls brought an ejectment in the Court of King's Bench in the name of *Deighton*, for the recovery of the lands. The queſtion was, whether *Grenville*, a repreſentative to *Burrows*, the cognizee of the laſt ſtatute, which was a reverſionary intereſt, to commence after the determination of *Gerrard*'s extent, was barred by the fine of *Thomas Lewis* and five years non-claim, or was within the ſecond ſaving of the ſtatute 4 *Hen.* 7., and ſhould be allowed five years to make his claim from the time when ſatisfaction was acknowledged on *Gerrard*'s ſtatute. The caſe was argued ſeveral times in the Court of King's Bench, and in 4 *Jac.* 1. judgment was given for *Grenville*, that *Burrows*'s intereſt was not barred by the fine. A writ of error was brought in the

Exchequer Chamber, where the caſe was alſo ſeveral times argued. Mr. Juſtice *Ventris* contended, that there was a very great difference between this caſe and the caſe of reverſions on eſtates for lives or years. 1ſt, Becauſe in thoſe eſtates there was, either by an expreſs limitation of the parties or the operation of law, a certain end of the eſtate beyond which it could not laſt, and until which it was not properly determined, which an eſtate held by extent has not. 2d, Becauſe, if a perſon who has a reverſion after an eſtate held by extent, was allowed five years to make his claim after the extent was determined by a perception of the profits, or an acknowledgment of ſatisfaction on record, then a claim was let in after an eſtate which no man could ſee the end of, for no perſon could tell when an extent would be ſatisfied by a perception of the profits, and much leſs whether ſatisfaction would ever be acknowledged; whereas other eſtates have a known and certain determination, ſo that it would be impoſſible to tell within what ſpace of time a poſſeſſion could be quieted, and thus the great end of the ſtatute of fines would be defeated. 3d, Becauſe it would be in the power of the party who had the extent, to protract the time as long as he pleaſed, for, until he thought proper to bring a *ſcire facias ad computandum*, the ſtatute would never be ſatisfied; ſo that it would be in the power of a ſtranger to make the eſtate of a perſon who was in poſſeſſion under a fine, liable to a future claim as long as he pleaſed. The judgment of the Court of King's Bench was reverſed by a majority of ſix Judges againſt two. But that court refuſed to award execution, becauſe there was a miſtake in the writ of error,

Vide 2 Vent. 333.

upon

upon which, a new writ of error was brought, whereon the judgment was affirmed for *Grenville*, there being three judges for reverſing, and three for affirming, and a majority being required to reverſe the judgment, it was of courſe to ſtand. A writ of error was then brought in the Houſe of Lords, where it was contended on the part of the plaintiff, that Mr. *Grenville* could not, by acknowledging ſatisfaction on *Gerrard*'s ſtatute, gain any new right to enter to avoid the fine levied by *Edward Lewis* above nine years before, by which, and by five years non-claim, his intereſt in the laſt extent was barred, becauſe an entry might and ought then to have been made into the extended eſtate, and the contrary opinion would tend very much to weaken the ſecurity of a fine and non-claim, which is the higheſt and beſt ſecurity in the law for quieting people in their eſtates, and preventing ſuits; and it would, therefore, be of very pernicious conſequence to all purchaſers and owners of eſtates, if ſuch old dormant incumbrances were ſet up againſt a fine and non-claim, and ſupported by ſuch a method as the vacating a ſtatute long before extinguiſhed, for, thereby, eſtates might be incumbered, which had been long enjoyed without interruption. On the other ſide, it was argued for the defendant, that it was not neceſſary to make any claim upon *Burrows*'s ſtatute, until *Gerrard*'s ſtatute appeared upon record to be ſatisfied, and ſo a claim made by the defendant by entry upon the premiſes, within five years after ſatisfaction entered upon record, on *Gerrard*'s ſtatute, was ſufficient to prevent *Burrows*'s extent from being barred by the fine. That this caſe did not differ in reaſon from the common and known

Colles Parl. Ca. 64.

known caſe where *A.* tenant for life, remainder in fee to *B.* is diſſeiſed, and the diſſeiſor levies a fine, and there is five years non-claim, though the eſtate of tenant for life be barred by this five years non-claim, and the remainder-man may if he pleaſe enter upon the five years non-claim by tenant for life, yet he may waive ſuch entry, and will have a new period of five years after the death of tenant for life, to make his claim; ſo, although *Burrows* might, if he had pleaſed, have entered upon the five years non-claim by *Gerrard*, yet he might ſtay and expect until ſatisfaction was entered upon the record of *Gerrard*'s ſtatute: for, as the death of the tenant for life is the proper and natural determination of an eſtate for life, ſo the entering ſatisfaction upon record, is the proper and natural determination of an extent upon a ſtatute; and, in the one caſe as well as the other, before ſuch determination, the remainder-man or reverſioner is not compellable to make his claim to avoid the fine.

The judgment of the Court of King's Bench was affirmed.

Plowd. 538. Tit. 31. ch. 2. f. 41.

§ 26. Although the ſtatute 4 *Hen.* 7. does not extend to the poſſeſſions of the church, yet in caſe a biſhop, dean, vicar, or prebendary, ſhould neglect to make his claim within five years after a fine is levied of an eſtate to which he is entitled, in right of his biſhoprick, *&c.* he will be barred during his life, but his ſucceſſor will be allowed five years to avoid the fine, from the time of his becoming entitled to the lands.

§ 27. In

§ 27. In the same manner, all those who have offices for life, to which lands and tenements are annexed, must make their claim within five years after a fine has been levied of such lands and tenements, otherwise they will also be barred during their lives. But each successive officer will be allowed five years to avoid the fine, from the time when he becomes entitled to the lands. Plowd. 538.

§ 28. If the estate which passed by a fine is at any time afterwards defeated, the fine will by that means lose all its force and effect, not only with respect to the person who avoided it, but also with respect to all other persons, except those who claim by force of an intail. Thus, it is said in the case of *Stowell* v. *Zouch*, that if there be tenant for life, remainder for life, remainder in fee, and the first tenant for life aliens, and the alienee levies a fine, the person in remainder for life may enter and defeat the fine, in which case, it will not bar the remainder-man in fee. Idem. 2 Inst. 518. West. Symb. p. 2. 73 a. Plowd. 359.

§ 29. By the common law, and also by the statute *de modo levandi fines*, all those who laboured under certain disabilities at the time when a fine was levied, were not affected by it; but they or their heirs might avoid it, at any distance of time. This doctrine was altered by the following clauses in the statute 4 *Hen.* 7: "And "if the same persons at the time of such action, right, "and title accrued, descended, remained or come unto "them, be *covert de baron*, or within age, in prison, "or out of this land, or not of whole mind, then it "is Of the Exceptions in favour of Infancy, &c. Bract. l. 5. c. 29. f. 3. Fleta l. 6. c. 54. 2 Inst. 516. 4 Hen. 7. c. 24. f. 5.

" is ordained, *&c.* that their action, right, and title, " be reserved and saved to them and their heirs, until " the time they come and be at their full age of twenty- " one years, out of prison, within this land, uncovert, " and of whole mind; so that they or their heirs take " their said actions, or their lawful entry, according to " their right and title, within five years next after that " they come and be at their full age, out of prison, " within this land, uncovert, and of whole mind; and " the same actions pursue, or other lawful entry take, " according to law.

" And also it is ordained, *&c.* that all such persons " as be *covert de baron*, not party to the fine, and " every person being within the age of twenty-one " years, in prison, or out of this land, or not of whole " mind, at the times of the said fines levied and en- " grossed, and by this said act afore except, having " any right or title, or cause of action to any of the " said lands and other hereditaments, that they or their " heirs, inheritable to the same, take their said actions, " or lawful entry, according to their right and title, " within five years next after that they come and be " of age of twenty-one years, out of prison, uncovert, " within this land, and of whole mind, and the same " actions sue, or their lawful entry take, and pursue " according to the law; and if they do not take their " actions and entry as is aforesaid, that they, and every " of them, and their heirs, and the heirs of every of " them, be concluded by the said fines for ever, in " like form as they be that be parties or privies to the " said fines."

§ 30. In

§ 30. In conſequence of theſe two clauſes, all thoſe who labour under any of the diſabilities therein ſpecified, either at the time when a fine is levied, or when a right to lands whereof a fine has been levied firſt accrues to them, are allowed five years from the removal of their diſabilities to make their claim.

§ 31. If an infant be in his mother's womb when a fine is levied, he will be allowed five years from the time he attains his full age to make his claim: for although he is not comprehended witin the letter of the act, which only mentions infants under the age of twenty-one years, and therefore does not extend to thoſe who are unborn, yet they are within the intention of the act, and will be aided by the exception. Plowd. 366.

§ 32. If a perſon labours under ſeveral diſabilities, at the ſame time, as if a woman is covert, under age, of inſane mind, and in priſon at the time when a fine is levied, or when a right to lands whereof a fine has been levied accrues to her, and one or more of thoſe diſabilities are removed, ſtill the five years given by the ſtatute will not commence until after all her diſabilities are entirely removed. Plowd. 375. 1 Leon. 215. 2 Atk. 614.

§ 33. It is ſtated by *Plowden*, in his report of the caſe of *Stowell* v. *Zouch*, that it was affirmed by many of the juſtices, and denied by none of them that he heard, that although the perſons compriſed in the exception were not under ſuch defects or impediments at the time of the fine levied, but became ſo againſt their will, after the fine levied, and before the laſt proclamation, Plowd. 366.

proclamation, and were in ſuch degree at the time of the laſt proclamation, they ſhall not be bound to five years next after the laſt proclamation, but they ſhall have five years next after their impediments or imperfections removed.

Plowd. 366. § 34. It was alſo ſaid in the ſame caſe by *Brown* and *Saunders*, that if a ſtranger to a fine who is of ſound mind, becomes *non ſanæ memoriæ*, or is impriſoned the third year after the proclamations made, and ſo continues until the five years are expired, and afterwards he becomes of ſound mind, or is out of priſon, he ſhall not be concluded by the fine; for laches in proſecuting his right cannot be imputed to him who wants liberty or memory, and therefore ſuch perſon is not comprehended in the intent of the ſtatute. But in this caſe if a ſtranger to the fine in the third year had gone beyond ſea, or had taken huſband and ſo had continued, until the five years were paſſed, there he ſhould be bound; for the going beyond ſea, or taking huſband, are voluntary acts, but inſanity of mind, or impriſonment, are againſt the will of the party.

§ 35. The doctrine laid down in the laſt ſection has been exploded by two modern caſes, in which it has been laid down as a rule, that when once the five years allowed to perſons labouring under diſabilities, to avoid a fine begin, the time continues to run, notwithſtanding any ſubſequent diſability.

Vide Doe ex dem. Duroure v. Jones, 4 Term Rep. B. R. 300.

§ 36. It

§ 36. It is said by some of the judges in the case of *Stowell* v. *Zouch*, that if a person whose defects or impediments are once removed, falls within a month after into the same defects or impediments again, and continues so all the five years, or at the end of the first month of the five years dies, his heir within age, the five years before commenced shall proceed, and non-claim within the same five years shall bind the party and his heirs, as well as if he had been void of all defects or impediments during the whole five years. Plowd. 375.

§ 37. Although the statute 4 *Hen.* 7. allows infants five years after they have attained their full age, to make their claim, yet an infant may, if he pleases, make his claim before he attains that age. Plowd. 366. 1 Leon. 215.

§ 38. The privileges of infancy, coverture, *&c.* are only given to those to whom a right first accrues, and in whom it first attaches; for if a person to whom a right first accrues, dies before the expiration of the first five years, which are allowed him to make his claim, and such right descends upon his son or heir at law who is then under age, or labours under any of the other disabilities mentioned in this act, still such son or heir must make his claim before the five years are expired, which commenced in the life-time of his ancestor, otherwise he will be for ever barred, because the right did not first accrue to him, but to a person who was not under any disability.

Stowell v. Zouch, Plowd. 355. Jenk. Cent. 6. Caſe 74.

§ 39. *John Stowell* being ſeiſed in fee, was diſſeiſed by *John Zouch*, who levied a fine with proclamations. Three years after the fine was levied, *John Stowell* died, without having made any entry or claim to avoid the fine, leaving his grandſon and heir at law, *Thomas Stowell*, the demandant, an infant of the age of ſix years, who made no claim during his minority, but entered on the lands within one year after he had attained his full age. It was determined by a great majority of all the judges in the Exchequer Chamber, after many ſolemn arguments, 1, That *Thomas Stowell* being a ſtranger to the fine, was clearly barred by the body of the act, unleſs he would take advantage of the exception in favour of infants, *&c.* and that he was not within the exception, becauſe it only extends to ſuch infants, *&c.* to whom a right accrues at the time when a fine is levied: whereas in the preſent caſe, no right accrued to *Thomas Stowell* at the time when the fine was levied, his grandfather being then living. 2, That *Thomas Stowell* was originally within the firſt ſaving of the ſtatute, as heir to his grandfather, to whom the right firſt accrued, being included in the words "ſaving to every perſon and perſons, "and to their heirs;" but not having purſued his remedy within the time preſcribed, he could not now take any advantage of the firſt ſaving: and, with reſpect to his infancy at the time of his grandfather's death, it could be of no ſervice to him, becauſe the ſtatute only gives the privilege of infancy to thoſe to whom a right firſt accrues: but where a right firſt accrues to a ſtranger who is of full age, and the five

years

years begin to run, if ſuch ſtranger dies before the expiration of the five years, leaving his heir under age, the heir can have no privilege of infancy, but muſt make his claim before the expiration of the five years, which began to run in the time of his anceſtor. 3, That *Thomas Stowell* was not within the ſecond ſaving, which preſerves to all *other perſons* ſuch right, title, *&c.* as ſhall firſt grow, remain or deſcend to them after the ſaid fine ingroſſed, for ſeveral reaſons; 1ſt, Becauſe, in conſequence of the words *other perſons*, this ſaving only extends to thoſe who are not compriſed in the firſt, and it was not the intention of the act to aid thoſe perſons in the ſecond ſaving who are comprehended in the firſt. 2d, The words, firſt grow, remain, or deſcend, only extend to the perſon in whom the right firſt attaches after a fine is levied; whereas no new right accrued to *Thomas Stowell* after the fine was levied, his only title being as heir to his grandfather, in whom the right attached when the fine was levied.

§ 40. If a perſon to whom a right accrued to lands whereof a fine had been levied, laboured under any of the diſabilities ſpecified and excepted in the ſtatute 4 *Hen.* 7. and died before his diſabilities were removed, it was formerly a doubtful point, whether the heir of ſuch a perſon was obliged to make his claim within five years after the death of his anceſtor, or was allowed an indefinite period of time for that purpoſe.

Caſe of Perſons dying under their Diſabilities.

2 Inſt. 519. Cro. Eliz. 219. 1 Leon. 211. Sav. 128.

This doubt aroſe from a difference of opinion between Lord *Coke* and *Anderſon*; Lord *Coke*, in his report of the caſe of *Sunie* v. *Howes*, ſtates that *Thomas Cotton* being tenant in tail of a moiety of certain lands, and tenant for life of the other moiety, with remainder to *William Cotton*, his eldeſt ſon in tail, *William Cotton* went to *Antwerp*. *Thomas Cotton* levied a fine with proclamations of all the lands, and *William Cotton* died ſoon after at *Antwerp*, without having ever returned to *England*, leaving a ſon under age, who entered on the lands. It was adjudged, that as to the moiety whereof *Thomas Cotton* was tenant in tail, *William*, the ſon of *William*, was barred by the ſtatute 4 *Hen.* 7. But as to the other moiety, whereof *Thomas Cotton* was only tenant for life, the entry of *William* the grandſon was lawful, and avoided the fine; for although *William* the ſon could not take advantage of the clauſe which ſaves the right of thoſe who are beyond ſea, provided they make their claim within five years after their return, becauſe *William* the father never did return, yet as perſons who are out of the realm at the time when a fine is levied, having a preſent right, are excepted out of the body of the act, which makes the bar, therefore, where a perſon was beyond ſea at the time when a fine was levied, and never returned, he was within the exception made in the body of the act, and his heirs might make their claim at any diſtance of time. That it was the ſame where an infant, not being a party to a fine, and having a preſent right, died during his infancy, his heirs might make their claim at any diſtance of time. That the ſame doctrine took place with

with reſpect to a man *non compos*, who died in that ſituation, or a man in priſon who died before he had recovered his liberty, or a married woman who died in the lifetime of her huſband; for all theſe were within the reaſon adjudged, of a perſon who was out of the realm, and never returned.

It is alſo laid down by Lord *Coke*, in *Beverley*'s caſe, "That if a man levies a fine with proclama- "tions, and at the time of the fine levied, he who "has a right is *non compos*, and afterwards he recovers "his memory, in this caſe he ought to purſue his "action, or make his entry, within five years after he "becomes of ſound memory; and in ſuch caſe, in "pleading, he ſhall ſhew, that, at the time of the "fine levied, he was *non compos mentis*, and all the "ſpecial matter: but if he who has ſuch right is "an idiot, or *non compos mentis*, and never recovers "his memory, the heir may have his action, or make "his entry when he will; for he is excepted out of "the body of the act, and is not bound to make any "entry, or bring his action within any time, but the "party himſelf, if he recovers his memory. The "ſame law, if he who is beyond ſea at the time of "the fine levied, and dies, there his heir may enter, "or bring his action when he will." 4 Rep. 125 *b.*

In *Leonard*'s report of *Cotton*'s caſe, it was held, that as to the moiety whereof Sir *Thomas Cotton* was tenant for life, the fine was no bar, but that *William* the grandſon might enter at any time within five years after he attained his full age, for *William* his father was not Cotton's Caſe, 1 Leon. 211.

bound by the ſtatute 4 *Hen.* 7. becauſe he was beyond ſea at the time when the fine was levied, and never returned; but that, by the equity of the ſtatute, his iſſue ſhould be allowed five years to make his claim, from the time he attained his full age. And *Anderſon*, Chief Juſtice, is reported to have ſaid, that although *William* the father died beyond ſea, yet, if his ſon did not make his claim within five years after the death of his father, being of full age, and without impediment, he ſhould be for ever barred.

1 Leon. 215.

§ 41. The doctrine laid down by *Anderſon* has been confirmed by the following determination:

Dillon v. Leman, 2 Hen. Black. Rep. 584.

William Nanton died ſeiſed in fee-ſimple of the lands in queſtion in 1758, leaving *Mary Dillon*, mother of the plaintiff, his heir-at-law; upon the death of *William Nanton*, one *Leman* entered into the ſaid lands, and became tortiouſly ſeiſed thereof, and, being ſo ſeiſed, in *Hilary* term 1765, levied a fine *ſur cognizance de droit come ceo*, &c. of the ſaid lands, whereupon proclamations were duly had: the ſaid *Mary Dillon* being under coverture at the time of levying ſuch fine. On the 20th *February* 1765, the ſaid *Mary Dillon* died under coverture, leaving the plaintiff then of the age of 21 years, of ſound mind, out of priſon, and within this realm, her ſon and heir. No entry or claim was made on or to the ſaid lands by or on behalf of the ſaid *Mary Dillon* in her life-time, nor at any time after by her huſband, nor by the plaintiff, until the year 1787, when the plaintiff made an entry to avoid the ſaid fine. And the queſtion was, whether, on the

above

above caſe, the plaintiff was barred by the ſaid fine from recovering the ſaid lands?

This caſe having been ſent by the Court of Chancery to the Court of Common Pleas, for the opinion of that court, and, having been twice argued there, Lord Chief Juſtice *Eyre* declared ſhortly the opinion of the court, "that the "exception in the firſt branch of the ſtatute 4 *Hen.* 7., "and the proviſo at the end of it, were to be taken to-"gether; that, being ſo taken, they did not amount ſo "much to an exception as a ſaving, the true meaning "of which was, that the rights of thoſe perſons who "were under diſabilities, and of their heirs, were ſaved "as long as the diſabilities continued, and five years "after, but no longer; therefore, that the heir, not "being himſelf diſabled, was barred, unleſs he pur-"ſued his right within the five years after it accrued "by the death of his anceſtor, dying under a diſability; "and, conſequently, that the plaintiff, in this caſe, "was prevented by the fine from recovering the lands "in queſtion." And to this effect was the certificate ſent to the Court of Chancery.

TITLE XXXV.

FINE.

CHAP. XII.

Of ſome other Effects of a Fine.

§ 1. *A Fine ſometimes operates as a Releaſe.*
4. *Sometimes as a Confirmation.*
6. *A Fine lets in the Reverſion, and makes it liable to prior Incumbrances.*
§ 8. *Operates as an Eſtoppel.*
10. *Sometimes creates a Forfeiture.*
19. *Operates as a Revocation of a Deviſe.*
20. *A Fine ſur done Grant and Render, gives a new Eſtate.*

Section 1.

A Fine ſometimes operates as a Releaſe.

THE operation of a fine frequently depends on the particular ſituation of the cognizor or cognizee, reſpecting the property of which it is levied. Thus, if one joint-tenant levies a fine to his companion, it will operate by way of releaſe.

Enſtace v. Scawen, Cro. Jac. 696.

§ 2. *John Stile* and *Suſan* a feme ſole, were joint-tenants for life. *Suſan* married, and ſhe and her huſband granted by fine to *John Stile tenementa prædicta et totum et quicquid habent pro termino vitæ prædictæ Suſan, &c.* The queſtion was, whether the fine ſhould enure by way of grant, or releaſe; and it was reſolved that it ſhould enure by way of releaſe.

1 Inſt. 200 *b.* *n.* 1.

§ 3. If one coparcener in tail levies a fine to another *ſur cognizance de droit, &c.* it does not enure by way

way of releaſe, but by way of grant; and it will be a diſcontinuance and alteration of eſtate, without execution, becauſe one coparcener may enfeoff another, and a fine is a feoffment of record.

Sometimes as a Confirmation.

§ 4. A fine may alſo operate as a confirmation of a former eſtate, which was before defeaſible. Thus, if a tenant in tail bargains and ſells his eſtate-tail in fee, and then levies a fine to the bargainee, the fine will operate as a confirmation of the eſtate which paſſed by the bargain and ſale. So, if a tenant in tail makes a leaſe not warranted by the ſtatute, confeſſes a judgment, makes a mortgage, or incumbers his eſtate in any other manner, and afterwards levies a fine, it will operate as a confirmation of all his prior charges and incumbrances.

2 Roll. Ab. 473. Seymour's Caſe, infra. ch. 14.

1 Ab. Eq. 257.

Holbeach v. Sambeach, Winch. 102.

§ 5. In the ſame manner, where a tenant for life and the remainder-man in tail join in granting a rent-charge in fee out of the land, and afterwards join in levying a fine to another perſon, the rent which was before determinable will be confirmed by the fine.

A Fine lets in the Reverſion and makes it liable to prior Incumbrances.

§ 6. The operation of a fine levied by a tenant in tail who has the immediate reverſion in fee in himſelf, is to merge the eſtate-tail, and bring the reverſion in fee into immediate poſſeſſion, by which means, it will become liable to the incumbrances of all thoſe who are ſeiſed of it. So that if a tenant in tail, with the immediate reverſion in fee in himſelf, makes a leaſe, acknowledges a judgment, or incumbers his eſtate in any

Symonds v. Cudmore, Tit. 17. f. 34. Shelburne v. Biddulph, Idem f. 35.

other manner, and his heir levies a fine, it will operate as a confirmation of the leaſe or judgment.

§ 7. In the ſame manner, where a perſon is tenant for life, remainder to his firſt and other ſons in tail, with the reverſion in fee in himſelf, and becomes indebted by bond, or incumbers the eſtate in any other manner; if, after the death of ſuch a tenant for life, his ſon levies a fine, it will let in the reverſion in fee, and make it liable to his father's incumbrances.

Kynaſton v. Clark, Tit. 17. f. 26.

§ 8. A fine being a judgment obtained by conſent in a fictitious ſuit, and recorded in a court of juſtice, all thoſe who are parties to it, and their heirs, are for ever concluded from averring or proving any thing againſt it, and therefore it operates towards them as an eſtoppel upon record. Thus, although a fine levied by perſons who have not an eſtate of freehold in the lands, is void as to all ſtrangers; yet it will operate as an eſtoppel againſt all the parties to it. So, if two perſons are ſeiſed in fee, and a ſtranger levies a fine to them, and to the heirs of one of them, the other will be thereby eſtopped from claiming any thing more than an eſtate for life in the lands.

Operates as an Eſtoppel. 1 Inſt. 352 *a*.

Shep. T. 14.

§ 9. A contingent remainder may, before it veſts, be barred by a fine, which will operate as an eſtoppel, ſo as to bind the intereſt that may afterwards accrue by the contingency.

Weale v. Lower, Tit. 16. ch. 8. f. 20. Vick v. Edwards, Id. f. 9.

§ 10. Where a perſon who is only tenant for life, levies a fine *ſur cognizance de droit come ceo, &c.* it will operate as a forfeiture of his eſtate, becauſe it is an attempt to create a greater eſtate than he can lawfully convey, and a renunciation of the feudal connection between the tenant and his lord. So, if a tenant for life accepts a fine *ſur cognizance de droit come ceo, &c.* it is alſo a forfeiture of his eſtate for life, for it is a denial of the tenure upon two accounts; 1ſt, In admitting the reverſion to have been in a ſtranger to convey; and, 2d, In accepting of it himſelf, to the prejudice of the perſon in reverſion.

Sometimes creates a Forfeiture. 1 Inſt. 251 *b.* Gilb. Ten. 38. Prec. in Ch. 591. 9 Rep. 106 *b.*

§ 11. If a tenant for life of a rent or advowſon levies a fine, it will have the ſame effect, for although the fine being levied of a rent paſſes no more than it lawfully may, yet being a public and ſolemn renunciation of the eſtate for life in a court of record, it is within the reaſon of the law, and amounts to a forfeiture.

1 Inſt. 251 *b.* 1 Roll. Ab. 852.

§ 12. If *A.* be tenant for life, with remainder to *B.* for life, and *A.* levies a fine to *B.*, this is a forfeiture of both their eſtates; for, by their own act on record, they have denied the reverſion to be in the lord, the one by giving, and the other by receiving it.

2 Lev. 202. Smith v. Abell. Co. Read. 3.

§ 13. *A.* was tenant for life, remainder for life to *B.*, remainder in tail to *C.*, remainder in fee to *B.*, and *B.* levied a fine *ſur cognizancè de droit come ceo, &c.* to a ſtranger. It was adjudged to be a forfeiture of his remainder

Garrett v. Blizard, 1 Roll. Ab. 855.

remainder for life, ſo that, after *A.*'s death, *C.* might enter, becauſe the fine conveyed a fee-ſimple in poſſeſſion by eſtoppel, againſt which he could not aver that he only paſſed an eſtate for life in *præſenti*, with a fee-ſimple expectant on the death of *C.* without iſſue; becauſe the fine ſuppoſes a prior gift in fee-ſimple, which he could not lawfully make while the eſtate for life of *A.* and the intermediate remainder of *C.* in tail were ſubſiſting.

§ 14. But where the perſon who has the next eſtate of inheritance joins with the tenant for life in levying a fine *ſur cognizance de droit come ceo*, &c. it does not then operate as a forfeiture.

Bredon's Caſe, 1 Rep. 76
3 Vent. 160.

§ 15. *A.* being tenant for life, with remainder in tail to *B.*, they both joined in levying a fine *ſur cognizance de droit come ceo*, &c. to a ſtranger in fee. It was reſolved, that this was neither a diſcontinuance nor a forfeiture, but that each of the parties to the fine gave that which he might lawfully diſpoſe of, and that the law would conſtrue it to be, firſt, the grant of the perſon in remainder, and afterwards the grant of the tenant for life.

Pigott v. Saliſbury, 2 Mod. 109.

§ 16. A fine *ſur conceſſit* levied by a tenant for life, does not operate as a forfeiture of his eſtate, becauſe it only transfers ſuch an intereſt as the tenant for life may lawfully paſs, without diveſting or diſplacing the eſtates in remainder or reverſion.

§ 17. No

§ 17. No fine levied by a *ceſtui que truſt* will be allowed in Chancery to operate as a forfeiture, becauſe it cannot affect the ſubſequent remainders; and, therefore, ſuch a fine will, in equity, operate at moſt as a grant of the intereſt of which the *ceſtui que truſt* has a power to diſpoſe. 2 P. W. 146. 3 Atk. 729.

§ 18. If a copyholder levies a fine of his copyhold, it will operate as a forfeiture, and, in ſuch caſe, no acceptance of the rent, or other act done by the lord, ſhall be available to make the eſtate again good. Supp. to Co. Cop. ch. 11.

It is ſaid, in a modern caſe, that this doctrine is too general, for, unleſs there is a change of poſſeſſion, the fine will be void as againſt the lord. Doe v. Hellier, 3 Term Rep. 162.

§ 19. A fine will, in general, operate as a revocation of a prior deviſe of the lands whereof the fine is levied. The reaſon of which, will be ſtated in Title 38. Operates as a Revocation of a Deviſe.

§ 20. In a fine *ſur done grant et render*, the cognizee is but an inſtrument, who has a ſeiſin only for an inſtant, which is not ſufficient to entitle his wife to dower; however, this fine operates as a feoffment, and re-enfeoffment, and gives a new eſtate. So that, if a perſon, ſeiſed of an eſtate *ex parte materna*, levies a fine *ſur done grant et render*, and takes back an eſtate to himſelf and his heirs, the nature of the deſcent is thereby altered, and the eſtate will thenceforth deſcend to his heirs *ex parte paterna*. A Fine ſur done grant et render, gives a new Eſtate. 1 Inſt. 31 *b*.

§ 21. *J. S.*

Price v. Langford, 1 Show. Rep. 92. Salk. 337. Carthew 140. Rep. Temp. Holt 253.

§ 21. *J. S.* being ſeiſed of lands *ex parte materna*, he and his wife levied a fine to *J. N.* and *J. D.*, and they, by the ſame fine, granted and rendered the ſame lands to the uſe of the ſaid *J. S.* and his wife, and the heirs of their two bodies, remainder to the right heirs of *J. S.* The huſband and wife died without iſſue, and the queſtion was, whether this remainder deſcended to the heirs of the part of the mother, or of the part of the father. It was argued, on the one ſide, that this ſeiſin of the cognizee was merely fictitious; for, if the cognizee had a term for years in the land, it would not be merged; that it was like the caſe of a ſurrender of a copyhold into the hands of the lord, who was thereby only a mere inſtrument; therefore, that nothing was altered by the fine, but the eſtate remained as before. On the other ſide, it was contended, that the cognizee could not render the eſtate unleſs he had it in him, and that the grant and render operated as a feoffment and re-enfeoffment. The court held, that the eſtate was once in the cognizee, otherwiſe he could not give it back: that the grant and render was a conveyance at common law, and made the cognizor a new purchaſer, as much as a feoffment and re-enfeoffment; ſo that the remainder deſcended to the heirs on the part of the father.

§ 22. It is obſervable, that this is the only ſort of fine which gives a new eſtate; for, if a perſon ſeiſed *ex parte materna* levies a fine *ſur cognizance de droit come ceo*, and either makes no declaration of the uſes of it, or declares it to be to the uſe of himſelf and his heirs,

Tit. 29. c. 3. f. 56.

heirs, the lands will ſtill deſcend *ex parte materna*, becauſe it is ſtill the old uſe, which, conſiſting in truſt and confidence, will follow the nature of the land, and will deſcend as the land would have deſcended, if no alteration had been made; and it is totally immaterial, whether the uſe be expreſsly declared upon a fine, or permitted to ariſe by implication.

TITLE XXXV.

FINE.

CHAP. XIII.

What Perſons, Eſtates, and Intereſts, are not barred by a Fine.

§ 2. *The King.*
3. *Eccleſiaſtical Corporations.*
5. *Eſtates not deveſted.*
8. *A future Right.*
13. *A Rent, Right of Way, or Common.*
15. *Neceſſity of an adverſe Poſſeſſion.*
18. *Eſtates Tail of the Gift of the Crown.*
19. *Springing and ſhifting Uſes.*
20. *Dignities.*

Section 1.

NOTWITHSTANDING the great force and effect of a fine, yet there are ſome particular perſons, eſtates, and intereſts, to which its operation does not extend.

The King.

§ 2. By the common law no laches can be imputed to the King, and therefore no delay or omiſſion on his part in making a claim will bar his right: from thence has ariſen the maxim, *nullum tempus occurit regi*, for the law ſuppoſes his Majeſty to be always buſied for the publick good, and therefore that he has not leiſure to aſſert his right within the time preſcribed for other perſons. It follows from this principle that the King cannot be barred by a fine, to which he is not a party, and five years non-claim; nor is his Majeſty's prero-

gative

gative in this inſtance taken away by the ſtatute 9 *Geo.* 3. c. 16. by which the King is only diſabled to ſue for any manors, lands, or hereditaments, where the right has not accrued to the Crown within ſixty years.

Eccleſiaſtical Corporations.

§ 3. Eccleſiaſtical corporations, and in general all eccleſiaſtical perſons, who are ſeiſed in right of their churches only, and have not an abſolute eſtate in their poſſeſſions, being reſtrained from alienation by ſeveral poſitive ſtatutes, are not only prohibited from levying fines, but cannot even bar their ſucceſſors by their non-claim*.

11 Rep. 78 *b.* 1 Roll. Rep. 151 Watſ. Comp. In. 427.

§ 4. Thus in the caſe of Magdalene College, one of the points was, whether the maſter and fellows were bound by a fine and five years non-claim; and it was reſolved that the right of the college was not barred by the fine and non-claim, for the words of the ſtatute 13 *Eliz.* c. 10. which prohibits all eccleſiaſtical corporations from alienation were, "that all leaſes, "gifts, grants, feoffments, conveyances, or eſtates to "be made, had, or ſuffered by any maſters and fel-"lows of any college, *&c.*" So that when a fine was levied and no claim was made for five years, there was a conveyance permitted and ſuffered by the maſter and fellows of the college; and it would have

* This agrees with the principles of the old law, as laid down by *Bracton. Illud item ut videtur obſervari deberet de jure et feodo eccleſiæ, ſi rector clameum non appoſuerit, quod eccleſiæ non prejudicatur, cum fungatur vice minoris, non magis quam minori ſi cuſtos clameum non appoſuerit.* Lib. 5. c. 29. f. 3.

been of no effect to have prohibited the maſter and fellows themſelves from making conveyances of their lands, if they were allowed to have a power by their permiſſion and non-claim, to bar their ſucceſſors. A biſhop, dean, or vicar, may, however, be himſelf barred by his own non-claim, as has been ſtated in a former chapter.

Howlet v. Carpenter, 3 Keb. 775. S. P.

Ch. 11.

Eſtates not deveſted.

§ 5. It is laid down by Lord *Coke* as a certain principle, that no fine will bar any eſtate in poſſeſſion, reverſion, or remainder, which is not deveſted and put to a right. This poſition is however too general, if the words "deveſted and put to a right" are underſtood in that ſtrict technical ſenſe which the law annexes to them. The word "deveſt" ſignifies nothing more than a mere deprivation of the poſſeſſion*; but the words, "put to a right," have a much more extenſive ſignificaion, for they mean, a deprivation not only of the poſſeſſion, but alſo of the right of poſſeſſion; ſo that where an eſtate is turned to a right, the owner has only the *jus proprietatis*, or mere right of property. If therefore Lord *Coke*'s poſition be taken ſtrictly, it will appear to be unſupported by any authority; for although it be neceſſary that an eſtate be deveſted before it be barred by a fine, yet it is by no means neceſſary that an eſtate ſhould be put to a right.

9 Rep. 106 *a*. T. Raym. 149.

Vide Tit. 29. ch. 1.

* *Deveſt, deveſtire*, is contrary to inveſt, for as *inveſtire* ſignifies *poſſeſſionem tradere*, ſo *deveſtire* means *poſſeſſionem auferre*. Cowell's Dict. 1 lib. Feud. tit. 7.

§ 6. That

§ 6. Thus in the caſe of *Stowell* v. *Zouch*, when *Stowell* was diſſeiſed by *Zouch*, his eſtate was merely deveſted, that is, he had only loſt the actual poſſeſſion, but it was not turned to a right, for he ſtill continued to have in him both the right of poſſeſſion and the right of property, and yet all the judges agreed that he was barred by the fine. Ante ch. 11. ſ. 39.

This caſe, and many others which will be mentioned in the preſent chapter, clearly prove the general rule to be—That no eſtate or intereſt can be barred by a fine unleſs it is deveſted out of the real owner, either before the fine is levied, or by the operation of the fine itſelf, that is, unleſs the real owner is turned out of poſſeſſion of ſuch eſtate or intereſt, and that while he continues in poſſeſſion, a fine will not affect him.

§ 7. The caſe in which this principle was laid down, and Lord *Coke*'s expreſſion in ſtating the reſolution of the Court, ſhews that this was the idea which he annexed to the words "put to a right," for, ſays he, "he who has the eſtate or intereſt in him, cannot "be put to his action, entry, or claim, for he has "*that* which the action, entry, or claim, would veſt in, "or give him:" and in another place he ſtates this principle in the following words: "No fine levied "with proclamations ſhall bind any but thoſe who are "put out of poſſeſſion, and have but a right, for if "their eſtate or intereſt be not deveſted out of them, "but remains in them as it was *ab initio*, they need "not make an entry or claim to that which never was "deveſted." Theſe paſſages fully prove Lord *Coke*'s meaning 9 Rep. 106 *a*. 5 Rep. 123 *b*. 2 Inſt. 517.

meaning to have been, that no perſon could be barred by a fine, unleſs he was firſt turned out of poſſeſſion, and had only a right of entry or action left in him; for if a perſon continued in poſſeſſion, after a fine had been levied, he could be under no neceſſity of making his claim or bringing his action; becauſe being ſtill in poſſeſſion, and not diſturbed by the fine, he had already all the advantages which thoſe remedies could procure him, and therefore it would be unneceſſary to purſue them.

Corbet v. Stone, Ante ch. 10. ſ. 38.

A future Right.

§ 8. It follows from this principle, that a future right cannot be barred by a fine; becauſe a perſon cannot be diſpoſſeſſed of it.

Ch. 10. ſ. 34. 5 Rep. 124 *b.*

§ 9. Thus, in *Saffin's* caſe, it was agreed, that although a term for years might be barred by a fine, if the leſſee were, or might have been in poſſeſſion, yet that ſo long as a leſſee for years had only an *intereſſe termini*, he was not affected by a fine; becauſe a man cannot be diſpoſſeſſed of an *intereſſe termini*. But when his term commenced, and he acquired a right to enter on the land, he then had ſuch a preſent eſtate as might be deveſted, and which he might reveſt by his entry; ſo that his non-claim for five years after the commencement of his term, barred him; becauſe from that time he was out of poſſeſſion.

Edwards v. Slater, Hard. 410.

§ 10. A man ſettled lands to the uſe of himſelf for life, and if he ſhould ſettle a jointure on his wife, and make a leaſe for thirty-one years, to commence after his death, that then the truſtees ſhould ſtand ſeiſed to

ſuch

ſuch uſes. He made a leaſe accordingly, and then he and his wife levied a fine. It was reſolved that the leaſe was not barred, becauſe being a future intereſt, it was not deveſted or diſplaced by the fine.

§ 11. The intereſt of tenants by ſtatute-merchant, ſtatute-ſtaple, or elegit, cannot be barred by a fine until they have extended the lands, or purſued their rights in ſome other manner; for until then, they have no right to enter on the lands, and therefore cannot be put out of poſſeſſion.

1 Mod. 217. Ante c. 10. ſ. 41.

§ 12. So where a man has a judgment for debt, and the debtor before execution aliens by fine, and five years paſs, yet the creditor may ſtill ſue out execution.

1 Cha. Ca. 268. 1 Freem. 211.

§ 13. Although the owner of a rent may bar it by a fine, yet a rent in the poſſeſſion of a third perſon cannot be ſo barred. It is the ſame of a right of way, or common; becauſe theſe being merely contingent rights, collateral to and iſſuing out of lands, they cannot be deveſted; for although a perſon who has a rent, right of way, or common, out of lands, be not in the actual enjoyment of them, yet by *non-uſer* alone, he does not ceaſe to have a veſted eſtate or intereſt therein, ſo that he ſtill continues to be in actual poſſeſſion; ſuch things being mere creatures of the law, and owing their exiſtence to the conſtruction thereof, they are always conſidered to be in the poſſeſſion of thoſe whom the law adjudges to have a right to ſuch poſſeſſion.

A Rent, right of Way, and Common.

5 Rep. 124 *a.* Bro. Ab. Tit. Fine, pl. 123. Shep. T. 22. Cro. Jac. 60. T. Raym. 149. 1 Freem. 312.

Hawk. P. C. ch. 64. ſ. 45.

It is ſaid that a rent may be deveſted by a diſſeiſin; but diſſeiſins of incorporeal hereditaments are only at the election and choice of the party injured, who, for the ſake of more eaſily trying the right, is pleaſed to ſuppoſe himſelf diſſeiſed; for as there can be no actual diſpoſſeſſion, he cannot be compulſively diſſeiſed of any incorporeal hereditament.

10 Rep. 97 *a.* Tit. 28. ch. 2. ſ. 33.

§ 14. Theſe principles have been recently confirmed by the Court of King's Bench, in their determination of the following caſe:

Mich. 13 G. 3. Goodright ex dem. Hare v. Board & Jones, MS.

In an ejectment for lands in *Surry*, the jury found a verdict for the plaintiff, ſubject to the opinion of the court on the following caſe. Lord *Bolingbroke*, being ſeiſed in fee of the premiſes in queſtion, by indenture of leaſe, dated the 1ſt *March* 1765, demiſed the ſame to *William Stevens* for twenty-one years, at the rent of 100 *l.* which leaſe, by meſne aſſignments, became veſted in the defendant *Board*. Lord *Bolingbroke*, by a bond dated 24th *July* 1770, with warrant of attorney to confeſs judgment, in conſideration of 3000 *l.* became bound to the leſſor of the plaintiff in the penal ſum of 6000 *l.* conditioned for the payment to her of an annuity of 500 *l.* during his own life; and by indenture of the ſame date, Lord *Bolingbroke*, in conſideration of the ſaid 3000 *l.* and as a farther ſecurity for the annuity, demiſed the premiſes in queſtion to the leſſor of the plaintiff for ninety-nine years, if his Lordſhip ſhould ſo long live, at a pepper-corn rent, with a proviſo, that the leſſor of the plaintiff ſhould the next day re-demiſe the premiſes to Lord *Bolingbroke*

broke for ninety-eight years and eleven months, if he ſhould ſo long live, at the rent of 500 *l.* which was accordingly done. Lord *Bolingbroke*, by leaſe and releaſe dated the 9th and 10th *March* 1773, conveyed the premiſes, for a fair and valuable conſideration, to the defendant *Jones* in fee, who had no notice of the annuity granted to the leſſor of the plaintiff. *Jones* being in poſſeſſion, levied a fine of the premiſes, with proclamations in *Trinity* Term 1775, to the uſe of himſelf in fee. The annuity was in arrear from the 24th *January* 1774, and the ejectment was brought in *Hilary* term 1782. Lord *Mansfield*.—We have looked into all the caſes, and have no doubt. It appears that the leſſor of the plaintiff, and the defendant *Jones*, are both innocent; *Jones* is a purchaſer for a valuable conſideration, without any notice of the leſſor of the plaintiff's title; the leſſor of the plaintiff is not alleged at any time to have known of the conveyance to *Jones*, and there was no circumſtance of notoriety atending the transfer to give her ſuch notice; for the viſible poſſeſſion continued the ſame after the ſale as before it; the leaſe to *William Stevens* ſubſiſting, and the payment of rent to *Jones*, inſtead of Lord *Bolingbroke*, carried with it no notoriety in the country. At the time of the conveyance, there was no arrear of intereſt due to Mrs. *Hare*, and therefore ſhe had no right to come upon the land in any ſhape. If ſhe was guilty of laches afterwards, there could be no *mala fides* in it with reſpect to *Jones*, as he is under no diſadvantage from it: ſo that it is a queſtion of mere law between two innocent parties, whether the right and intereſt of the leſſor of the plaintiff is barred by

the fine and non-claim. This depends on one clear propoſition, which is a general rule of law founded in good ſenſe; and although it be difficult to find a rule without an exception, yet I know of none to this propoſition. It is laid down in 9 *Co. Rep.* 106 *a.* "Reſolved *per totam Curiam*, that no fine nor warranty "ſhall bar any eſtate in poſſeſſion, reverſion, or remainder, which is not deveſted and put to a right." This general rule is illuſtrated and applied to ſeveral caſes throughout the books; and hence it follows, that no collateral intereſt can be barred by a fine; as a rent-charge, a right of common, *&c.* and the authority cited from *Carter* 24. that a rent-charge may be barred by a fine, is totally miſtaken; for, in looking into it, it appears to be thus; the owner of a rent-charge levied a fine of the land; the queſtion was, whether the rent-charge paſſed by the fine; and a diſtinction was taken between a fine operating as a grant or as a bar. Here the fine operated as a grant, and not as a bar; the rule is univerſal, that a rent-charge in a third perſon is not barred by a fine and non-claim. Hence the parties to a fine, or one of them, muſt be in of a ſeiſin or poſſeſſion adverſe to that intereſt which is to be barred; for, if it be conſiſtent with it, the fine does not deveſt it, and therefore is no bar. Now, at the time of the conveyance to *Jones* in 1773, Lord *Bolingbroke* had no adverſe poſſeſſion; he had paid all arrears, and as the leſſor of the plaintiff had no right to come on the land but for arrears, ſhe had then no title in her. At the time when the fine was levied, there was an arrear of a year and an half due; but the leſſor of the plaintiff was not bound to reſort to

the lands for her remedy, ſhe had other ſecurities; beſides, ſhe could not enter on the lands, the leſſee for years being in poſſeſſion; all ſhe could do was by notice to the tenant under the ſtatute 4 & 5 *Ann.* c. 16. which makes attornment unneceſſary, either to diſtrain or bring an action for the rent. In every ſhape it is moſt clear, that the leſſor of the plaintiff's intereſt was not deveſted or turned to a right; and therefore that it remained after the fine juſt as it did before. Judgment was given for the leſſor of the plaintiff.

Neceſſity of an adverſe Poſſeſſion.

§ 15. It is not only neceſſary that a perſon ſhould be out of poſſeſſion to be affected by a fine, but it is alſo requiſite that the party levying the fine ſhould have an adverſe poſſeſſion inconſiſtent with that of the perſon to be barred; ſo that if the poſſeſſion of the party who levies a fine is conſiſtent with that of any other perſon, ſuch other perſon will not be affected by it.

Ford v. Lord Grey, 6 Mod. 44. Salk. 285.

§ 16. Thus, it has been ſettled, that the poſſeſſion of one joint-tenant is the poſſeſſion of the other, ſo as to prevent the effect of the ſtatute of limitations; and that where there are two joint-tenants in fee, if one of them levies a fine of the whole, it does not amount to an ouſter of his companion, but only ſevers the jointure, though he is in of the old uſe again.

Tit. 20. f. 11. &c. Tit. 19. f. 7.

§ 17. The poſſeſſion of one tenant in common, or of one coparcener, is the poſſeſſion of the other, nor does the bare perception of all the rents and profits by one,

one, amount to an ouſter of the other, ſo as to make him liable to be barred by a fine.

Eſtates Tail of the Gift of the Crown.

§ 18. When fines became common aſſurances of lands, the Judges would no more allow a fine to deveſt the intereſt of the King, than any other conveyance, but preſerved the King's remainder or reverſion, although they allowed the fine to be a good bar to the eſtate tail, on which the King's remainder or reverſion depended, for otherwiſe an eſtate-tail, with a remainder or reverſion in his Majeſty, would have been unalienable; and if a fine was levied of an eſtate of this kind, it only paſſed a baſe fee, determinable on failure of heirs of the body of the tenant in tail.

But by a clauſe in the ſtatute 32 *Hen.* 8. c. 36. ſ. 4. it was provided that "that ſtatute ſhould not extend "to any fine levied by any perſon or perſons, of any "manors, lands, tenements, or hereditaments, before "the time of levying the ſame fine, given, granted "or aſſigned to the ſaid perſon or perſons ſo levying "the ſame fine, or to any of his or their anceſtors in "tail, or by virtue of any letters patent of the King, "or any of his progenitors, or by virtue of any act "or acts of parliament, the reverſion whereof, at the "time of the ſaid fine or fines ſo levied, being in the "King, his heirs or ſucceſſors; but that every ſuch "fine and fines ſhould be of like force, ſtrength, and "effect, as they were or ſhould have been if that act "had never been had or made."

In

In conſequence of this proviſo the operation of fines levied by tenants in tail, where there was a remainder or reverſion in the crown, depended on the ſtatute 4 *Hen.* 7. and it was much doubted whether the iſſue in tail were barred or not. But on account of a ſtatute made two years after, 34 & 35 *Hen.* 8. c. 20. it was reſolved that no fine, levied by a tenant in tail, of the King's gift, *&c.* where there was a remainder or reverſion in the crown, ſhould operate as a bar to the iſſue in tail, or ſhould affect the remainder or reverſion which was in the crown.

1 Inſt. 372 *b.* T Raym. 349. Sir T. Jones 252.

With reſpect to the conſtruction of the ſtatute 34 & 35 *Hen.* 8. and the caſes which have been determined on it, they will be ſtated in the Eſſay on Recoveries.

19. A ſpringing or ſhifting uſe cannot be defeated or deſtroyed by a fine levied of the eſtate out of which ſuch ſpringing or ſhifting uſe is to ariſe, unleſs there be a non-claim of five years after it ariſes. Thus, in the caſe of *Lloyd* v. *Carew*, which has been ſtated in a former title, it appeared that *Richard Carew* and *Penelope* his wife, in order to extinguiſh and deſtroy all ſuch right as the heirs of *Penelope* might have under the proviſo, and for ſettling the ſame on the ſaid *Richard Carew* and his heirs, levied a fine of all the eſtate, and declared the uſes thereof to *Richard Carew* for life, remainder to *Penelope* for life, remainder to *Richard Carew* in fee. *Richard Carew* died without iſſue, upon which the heirs of *Mary* claimed the eſtate under the proviſo, and filed their bill in Chancery, to compel the truſtees to convey the eſtate

Springing and Shifting Uſes.

Vide Tit. 16. ch. 5. ſ. 30.

eſtate to them, on payment of the 4000 *l.* The bill was diſmiſſed; but upon an appeal to the Houſe of Lords, the decree of diſmiſſion was reverſed, it being alledged that this proviſo was within the ſame reaſon with thoſe limitations which were allowed in the Duke of *Norfolk*'s caſe, where it is ſaid that future intereſts, ſpringing truſts, or truſts executory, and remainders to ariſe upon future contingencies, are quite out of the rule and reaſon of perpetuities, if they are not of remote conſideration, but ſuch as will ſpeedily wear out. And that the fine could not bar the benefit of this proviſo, becauſe the ſame never was nor could be in *Penelope*, who levied the fine.

Dignities. Tit. 26. f. 121, 122.

§. 20. A dignity or title of honour cannot be barred or ſurrendered by fine, as has been already ſtated.

TITLE

TITLE XXXV.

FINE.

CHAP. XIV.

How Fines may be reverſed and avoided.

§ 1. *Writ of Error.*
5. *Who may bring a Writ of Error.*
25. *Writ of falſe Judgment.*
26. *Writ of Deceit.*
31. *Motion.*
§ 33. *Modes of avoiding the Effects of a Fine.*
34. *Action.*
38. *Entry.*
57. *Plea.*
60. *Averment of Fraud.*
64. *Courts of Equity.*

Section 1.

A FINE being conſidered as a judgment given in a court of record, it can only be reverſed by a writ of error, which is alſo a matter of record, being a commiſſion to judges of a ſuperior court, authoriſing them to examine the record upon which a judgment was given, and, on ſuch examination, to affirm or reverſe the ſame according to law. Writ of Error.

§ 2. During the term in which a judicial act is done, the record may be amended or invalidated, without a writ of error, becauſe, during the term, the record is in the breaſt of the court, and the rolls are alterable at the diſcretion of the judges; and, now, the courts of juſtice allow amendments to be made at any time while the ſuit is depending, notwithſtanding the record be 1 Inſt. 260 *a*. 3 Com. 407.

be made up, and the term be paſt; for they conſider the proceedings as in *fieri* until the judgment is given; ſo that a fine may now be amended or invalidated at any time during the term in which it is levied, by an application to the Court of Common Pleas.

Fitz. N. B. 21.

§ 3. A writ of error is, properly ſpeaking, a proceeding in the nature of an appeal, and, therefore, muſt be brought in a ſuperior court; ſo that a writ of error to reverſe a fine is uſually brought in the Court of King's Bench, becauſe that court has an appellant juriſdiction over the Court of Common Pleas. But where the error aſſigned in a judgment does not ariſe from any fault in the court, but from ſome defect in the execution of the proceſs, or from ſome matter of fact, the writ of error muſt be brought in the ſame court in which the judgment was given. And, therefore, in caſes of this kind, a writ of error to reverſe a fine muſt be brought in the Court of Common Pleas.

§ 4. With reſpect to fines levied before the juſtices of *Wales*, purſuant to the ſtatute 34 and 35 *Hen.* 8. it is provided by that ſtatute, ſ. 113. that all errors therein ſhall be redreſſed by writ of error, to be ſued out of the King's Chancery in *England*, returnable before the King's Juſtices of his Bench in *England*. And by the ſtatute 43 *Eliz.* c. 15. ſ. 6. it is provided, that all fines levied in the county of the city of *Cheſter* purſuant to that act, ſhall be ſubject to be reverſed upon writs of error to be ſued and proſecuted before the High Juſtice of the county palatine of *Cheſter*, as other judgments given in the Portmoot Court.

§ 5. With

§ 5. With reſpect to the perſons who may bring a writ of error, it ſhould be premiſed, that no perſon has a right to reverſe a fine, unleſs he can ſhew that, upon ſuch reverſal, he will be entitled to the land; for the courts of law will not diſpoſſeſs the preſent tenant, unleſs the demandant can make out a clear title, poſſeſſion always carrying with it the preſumption of a good title, until the contrary appears. Beſides, if the perſon who demands the reverſal of the fine, cannot prove that he has a title to the lands of which the fine was levied, it follows, that he is not affected by it; and it would be trifling with courts of juſtice, for a perſon to ſeek relief, who cannot make it appear that he has received an injury.

Who may bring a Writ of Error. Roll. Ab. Tit. Error (K.)

§ 6. The perſon, therefore, entitled to a writ of error to reverſe a fine, is he who would have been entitled to the lands if the fine had not been levied, which, in general, is the heir at law; but where one who is ſeiſed *ex parte materna*, levies a fine in which there is error, the heir *ex parte materna* will be entitled to the writ of error. The younger ſon, when entitled to the lands by the cuſtom of Borough *Engliſh*, ſhall have the writ of error, and not the heir at common law, for this remedy deſcends with the land. A brother of the half-blood, however, is not entitled to bring a writ of error on a fine levied by his elder brother, though, if there had not been ſuch fine, the land would have deſcended to him.

Dyer 90 *a*.

1 Leon. 261.

Idem.

1 Inſt. 14 *a*. *n*. 6.

§ 7. In a writ of error to reverſe a fine, it is not requiſite, that the perſon who brings the writ ſhould deduce

Champernoon v. Godolphin, Cro. Jac. 150.

duce his title and pedigree, unleſs it be a ſpecial caſe varying from the common courſe, as, where a writ of error is brought by a ſpecial heir in tail, or a perſon in remainder.

1 Roll. Ab. 747.

§ 8. All thoſe who are parties to a fine, muſt, in general, join with the perſon entitled to the land in reverſing it; but this rule admits of ſome exceptions.

Piggot v. Harrington, Cro. Eliz. 115.

§ 9. Huſband and wife were tenants for life, with remainder to an infant in fee, and they all joined in levying a fine. The infant alone brought a writ of error to reverſe it, on account of his nonage. It was objected, that ſince all had joined in the fine, they ſhould likewiſe join in the writ of error: that the huſband and wife ſhould be ſummoned and ſerved, and then the infant alone might proceed to aſſign errors. But it was adjudged that the writ of error was well brought by the infant alone, becauſe the error aſſigned was not in the record, but without it, *viz.* in the perſon of the infant.

5 Rep. 39 *b.*

§ 10. No perſon can have a writ of error to reverſe a fine, who took any eſtate by it, becauſe no recoveror can bring a writ of error to defeat a record, by which he himſelf has recovered; for the judgment in a writ of error is, to avoid that which the plaintiff has loſt.

Idem.

It follows, from this principle, that in a *fine ſur done grant et render*, the cognizor cannot aſſign error in the *grant et render*, by which he himſelf has taken an eſtate.

§ 11. A writ

§ 11. A writ of error to reverſe a fine, muſt be brought againſt ſome one of thoſe who were parties or privies to it, and not againſt the tenant of the land only. But the court will not, in general, reverſe a fine, unleſs a *ſcire facias* is returned againſt the perſons who are then in poſſeſſion; for the cognizees of a fine are frequently nothing more than truſtees, and have no beneficial intereſt in the lands. 1 Salk. 339. Rep. Temp. Holt, 614.

§ 12. Although it is a rule, that in actions for the recovery of dower, the parol ſhall not demur on account of the infancy of the heir; yet if a man and his wife levy a fine, and, after the huſband's death, the wife brings a writ of error to reverſe it, in order to recover her dower, the heir may plead his infancy, and the parol ſhall demur.

§ 13. In error to reverſe a fine levied by the plaintiff and her huſband, the heir being ſummoned as terre-tenant, appeared and pleaded that he was within age, and prayed that the parol might demur. The plaintiff counter-pleaded the age, ſhewing that ſhe was entitled to have dower before the fine levied, and was now barred of dower by the fine which was erroneous, and ſet forth the errors. Upon demurrer and ſolemn argument, it was adjudged, that the parol ſhould demur, and that the plaintiff ſhould not have the advantage to take from the defendant his age, having by the fine, ſo long as it ſtood in force, barred herſelf of her dower; and therefore the law will rather favour the infant, whoſe privilege was immediate, than the plaintiffs, which was only mediate, after the fine was reverſed. Herbert v. Binion, Cro. Jac. 392.

§ 14. Errors may be assigned either in fact, as that the cognizor to a fine was an infant, or else in law, that is, on account of some defect appearing on the face of the record. But nothing can be assigned for error in fact, in a fine which contradicts the record, because the records of a court of justice are of so great credit, that they can only be defeated by matters of equal notoriety with themselves; and, therefore, although the circumstances assigned for error, should be proved by witnesses of the greatest credit, yet such evidence cannot be admitted. Thus, we have seen, that where the entry of the king's silver before the death of the cognizor, appears upon record, no averment against it can be made.

1 Roll. Ab. 757.

Ante Ch. 2. s. 54.

Dyer 89 *b.*

§ 15. No averment can be made, that the cognizor of a fine died before the *teste* of the writ of *dedimus potestatem*, when it appears by the certificate of the concord that he was alive, for this contradicts the record. But an averment of the death of the cognizor generally, before the engrossment, entry, and recording of the king's silver, is admissible.

Wright v. Mayor of Wickham, Cro. Eliz. 468.

§ 16. Where a fine is acknowledged in court, the plaintiff in error cannot assign for error that the cognizor died before the return of the writ of covenant, for that would directly contradict the record, because no fine is ever acknowledged in court, until the writ of covenant is returned; for, until then, the parties are not before the court. But if the fine is acknowledged before commissioners, it may then be averred, that the cognizor died before the return of the writ of covenant,

or that, after the acknowledgment, and before the return of the certificate thereof, the cognizor died; because these facts are consistent with the record.

§ 17. A fine was acknowledged before *Roger Manwood* Esq. one of the justices of the Common Pleas, and, afterwards, a writ of *dedimus potestatem* was directed to Sir *Roger Manwood*, (he having been knighted after the fine was acknowledged) who returned it with his name and title: this circumstance was assigned for error, but it was not allowed, because it contradicted the record, by which it appeared that the writ of *dedimus potestatem* was directed to Sir *Roger Manwood*, who, by virtue thereof, took the acknowledgment. Arundel v. Arundel, Cro. Eliz. 677.

§ 18. A person may bar himself from bringing a writ of error in several ways; thus, if a man releases all his right in, or makes a feoffment of, the land whereof a fine has been levied, he will be thereby barred from bringing a writ of error, because, by his release or feoffment, he has for ever excluded himself from the land; and no person can have a writ of error who is not entitled to the land. But if a person releases his right in, or makes a feoffment of, part of the land, he may still reverse the fine as to the remainder. 1 Roll. Ab. 788.

§ 19. If an infant brings a writ of error to reverse a fine levied by him during his infancy, and, on inspection, his nonage is recorded by the court, but before the fine is reversed, he levies another fine, the second fine will prevent him from reversing the first, because Hart's Case, id.

the ſecond fine having entirely barred him of all right to the lands, muſt alſo deprive him of all remedies to recover them.

Cockman v. Farrer, T. Raym. 461. T. Jones 181.

§ 20. In a writ of error to reverſe a fine, the defendant cannot plead in bar the ſame fine which is attempted to be reverſed, and five years non-claim, *quia non valet exceptio iſtius rei cujus petitur diſſolutio.*

Barton v. Lever & Brownlow, Cro. Eliz. 388.

§ 21. A common recovery will bar the iſſue in tail from bringing a writ of error to reverſe a fine levied by his anceſtor, becauſe the eſtate tail being barred by the recovery, the iſſue in tail has no title to the land.

Fazakerly v. Baldo, Salk. 341. 13 Vin. Ab. 338.

§ 22. The manner of reverſing fines differs from that which is obſerved in reverſing other judgments, for, in thoſe caſes, the record itſelf is removed into the court in which the writ of error is brought, becauſe in adverſary ſuits, errors cannot be aſſigned on a tranſcript of a record only: but, in caſes of fines, nothing more than the tranſcript is removed, on which the errors are aſſigned; and if the fine is erroneous, the Court of King's Bench may ſend for the record itſelf and reverſe it, or elſe ſend a writ to the treaſurer or chamberlain of the Court of Common Pleas to take it off the file.

1 Rep. 76 *b.* 1 Roll. R. 11. 3 Lev. 36.

§ 23. It is ſaid by Lord *Coke* and others, that if there be tenant for life, remainder in fee to an infant, and they both join in levying a fine, which is afterwards reverſed by the perſon in remainder on account of his infancy, yet that the cognizee ſhall have the lands during

ing the life of the tenant for life. But, in the caſe of *Zouch* v. *Thompſon*, it was adjudged, that although a fine might be reverſed as to part of the lands, and remain good as to the reſidue, yet that a fine could not be reverſed *in toto* as to one perſon, and remain good *in toto* as to another. 1 Ld. Raym. 179.

§ 24. By the ſtatute 23 *Eliz.* c. 3. ſ. 2. it is enacted, "That no fine ſhall be reverſed for falſe or incongruous *Latin*, razure, interlining, miſ-entering of any proclamations, miſ-returning or not returning of the ſheriff, or want of form in words and not in ſubſtance." And, by the ſtatute 10 and 11 *W.* 3. c. 14. a writ of error to reverſe a fine muſt be brought and proſecuted within 20 years after ſuch fine levied. Vide Tit. 36. c. 14.

§ 25. A writ of error can only be brought to reverſe a judgment in a court of record; for, to amend errors in a baſe court, which is not of record, a writ of falſe judgment lies, returnable in the Court of Common Pleas. Writ of falſe Judgment. 1 Inſt. 288 *b*.

§ 26. Where a fine is levied in the Court of Common Pleas, of lands held in ancient demeſne, the lord may reverſe it by writ of deceit; and ſuch writ may be brought by the lord againſt the parties to the fine and the *ceſtui que uſe*, by means of which, he ſhall obtain judgment not only for damages, (which are uſually remitted), but alſo to recover his court and juriſdiction over the lands, and to annul the former proceedings. Writ of Deceit. Fitz. N. B. 98. 2 Inſt. 216. Rex v. Mead, 2 Wilſ. R. 17. Com. R. 126.

Anon. 1 Lepn. 290.

27. If a fine be levied of lands, whereof part are held in ancient demeſne, and part frank-fee, and the lord in ancient demeſne brings his writ of deceit, the Court of King's Bench, upon a view of the tranſcript of the record, and proof that part of the lands are ancient demeſne, will reverſe the fine as to that part. They will not, however, order the fine to be taken off the file, as in caſes where the whole fine is reverſed, becauſe it will remain good as to the lands which are frank-free, but will order a mark to be made on the fine, to ſhew that it is cancelled, as to the lands held in ancient demeſne.

§ 28. The lord of a manor, held in ancient demeſne, is not barred of his writ of deceit by the death of any of the parties to the fine.

Touch v. Thompſon, 1 Ld. Raym. 177.

§ 29. A writ of deceit was brought by the lord of a manor held in ancient demeſne, to avoid a fine levied of lands held of him as of the ſaid manor. It was argued for the defendant, that the cognizor and the cognizee being both dead, the lord could not now maintain an action of deceit, becauſe it was only a perſonal action, and, therefore, died with the perſon. But it was reſolved that a writ of deceit did lie in ſuch a caſe, againſt the heir of the cognizor or cognizee, becauſe it was a real deceit, and did not reſemble the perſonal deceit of non-ſummons; and if the law were otherwiſe, the lord of a manor, held in ancient demeſne, would be for ever barred of his right of inheritance, in caſe the parties to ſuch a fine ſhould happen to die the day after it was levied.

§ 30. Where

§ 30. Where a fine levied in the Court of Common Pleas, of lands held in ancient demeſne, is reverſed by writ of deceit, it is ſaid to be doubtful, whether the fine ſhall ſtill hold good between the parties. Some ſay it does not become entirely void, nor is the cognizor reſtored to his land againſt his own ſolemn acknowledgment on record; eſpecially ſince the lord who brings the writ of deceit ſeeks nothing more than to reſtore the land to the privileges of ancient demeſne. Others hold, that the writ of deceit, and the reverſal thereon, entirely avoids the fine, and reſtores the cognizor to the poſſeſſion of the land; for the cognizance, though on record, ſhall be no eſtoppel, becauſe it was made in a court which had no juriſdiction, and, therefore, the whole proceedings were *coram non judice*. Cro. Eliz. 471.

§ 31. In ſome caſes, the Court of Common Pleas will vacate and ſet aſide a fine upon motion, although the king's ſilver has been paid, and the fine completed, without putting the parties to the trouble and expence of a writ of error; in the ſame manner as they would ſet aſide a judgment obtained by trick or ſurpriſe. Motion. 2 Show. Rep. 281.

§ 32. Thus, where it evidently appeared to the Court, that a huſband had prevailed on his wife to levy a fine, ſhe being but ſixteen years old; the fine was vacated, and the exemplification brought into court and delivered up; the commiſſioners were alſo ordered to be proſecuted. Hutchinſon's Caſe, 2 Lev. 36. Watts v. Birkett, ante.

§ 33. Although a fine can only be reverſed by a writ of error, yet its effects may be avoided in ſeveral other Modes of avoiding the Effects of a Fine.

Plowd. 359. 2 Inſt. 518. 2 Black. Rep. 994.

other ways. There were four modes of avoiding a fine at common law, two by matters of record, and two by acts *in pais*. Thoſe by matter of record were, a real action commenced within a year and a day after the fine was levied; and an entry of a claim on the record of the foot of the fine itſelf, in this manner, *talis venit et apponit clameum ſuum*. Thoſe by acts *in pais* were, a lawful entry upon the land by the perſon who had a right; and, in caſe that could not be done, then a continual claim.

Action. Brafier's Caſe, 2 Leon. 58.

§ 34. By the ſtatute 4 *Hen.* 7. all thoſe who are affected by a fine, muſt purſue their title by way of action or lawful entry; ſo that a claim entered on the record of a fine, would now be ineffectual. An action commenced within five years after a fine has been levied, will be ſufficient to avoid it, although judgment be not obtained within ſeven years after. But ſuch action muſt be proſecuted with effect, for, if an action

1 Vent 45.

be commenced within the time preſcribed, and afterwards diſcontinued, it will not avoid a fine.

Fitzhugh's Caſe, 2 Leon. 221.

§ 35. The ſuing out of a writ, and delivering it to the ſheriff, does not amount to a purſuing of a claim or title by way of action, unleſs the writ be returned by the ſheriff.

Comb. 249. ſ. 38.

§ 36. The action mentioned in the ſtatute 4 *Hen.* 7. muſt be a real action; ſo that an ejectment will not avoid a fine.

§ 37. A bill

§ 37. A bill in Chancery is not ſuch a claim under the ſtatute 4 *Hen.* 7. as will avoid a fine. There is, however, an exception to this rule, in the caſe where a fine has been levied of a truſt eſtate, becauſe no entry by the *ceſtui que truſt*, nor claim or other legal act, will be ſufficient to avoid the fine, or ſuſpend the bar ariſing from the non-claim; it can only be by bill in Chancery, as the claim to avoid a fine ought to be of a nature which correſponds with the eſtate. 1 Chan. Ca. 268—278. 2 Bl. Rep. 994.

§ 38. A fine may alſo be avoided by an actual entry made on the lands whereof the fine has been levied, provided the perſon who ſeeks to avoid the fine has a right of entry; but if the right of entry be taken away and a right of action only remains, as, where a fine operates as a diſcontinuance of the eſtate, there an actual entry on the land will not avoid the fine, but a real action muſt be brought. Entry. 1 Vern. 213.

§ 39. Where an eſtate tail is diſcontinued, the eſtates in remainder and reverſion expectant thereon are deveſted, and the perſons entitled to ſuch eſtates are barred of their entry, and driven to their action. 1 Inſt. 332 *b.* 1 H. Black. Rep. 269.

An eſtate tail may be diſcontinued by five different modes of conveyance. A feoffment, fine, recovery, releaſe, and confirmation with warranty. But no perſon can create a diſcontinuance, who is not in the actual poſſeſſion of the eſtate tail by force of the intail. 1 Inſt. 325 *a.* Tit. 2. c. 2. § f. 14.

§ 40. Where the original conveyance of an eſtate is not by fine, but it is only levied as a confirmation of ſome

ſome prior conveyance, it will not, in that caſe, operate as a diſcontinuance, or take away the entry of the remainder-man.

Seymour's Caſe, 10 Rep. 95.

§ 41. Lord *Cheney* being tenant in tail, with remainder in tail to *John Cheney*, Lord *Cheney* conveyed the premiſes, by bargain and ſale inrolled, to *William Higham* and his heirs, by force whereof he entered and was ſeiſed, and, in a year afterwards, he levied a fine with proclamations to the ſaid *Higham* and his heirs, with general warranty. Lord *Cheney* died without iſſue, and *John Cheney*, the remainder-man in tail, entered upon the premiſes. The queſtion was, whether his entry was lawful or not? It was reſolved, that the entry of *John Cheney* was not taken away by the fine, becauſe it did not diſcontinue the eſtate tail, but only operated as a confirmation of the eſtate of the bargainee, which was originally determinable on the death of the tenant in tail; whereas the fine confirmed it as long as the tenant in tail had heirs of his body. It was agreed, that if the fine had been levied before the bargain and ſale was executed, it would have diſcontinued the eſtate tail, and deveſted the remainder and reverſion, by which means, the entry of *John Cheney* would have been taken away; but the eſtate-tail not being diſcontinued, the remainder was not deveſted or turned to a right, ſo that *John Cheney* ſtill continued in poſſeſſion of it, and, therefore, the fine was no bar to him.

§ 42. But where a fine is levied in purſuance of a covenant in a prior conveyance of an eſtate-tail, as where

where a tenant in tail conveys his eſtate by leaſe and releaſe, and covenants in the releaſe to levy a fine, which is done accordingly; in that caſe, the leaſe and releaſe and fine will be conſidered as one aſſurance, and will therefore operate as a diſcontinuance of the eſtate tail.

§ 43. A perſon being tenant in tail-male, with remainder over in fee, in conſideration of a marriage, conveyed his eſtate tail by leaſe and releaſe to truſtees and their heirs, to ſeveral uſes, and, in the releaſe, he covenanted to levy a fine to the ſame uſes. The marriage took effect, and the tenant in tail levied a fine purſuant to his covenant. On the death of the tenant in tail without iſſue, the remainder-man in fee made an actual entry upon the lands to avoid the fine, and then brought his ejectment. The queſtion was, whether the plaintiff would maintain an ejectment? It was contended, that an ejectment might be maintained, unleſs a diſcontinuance could be proved; that, from the authority of *Seymour*'s caſe, the fine did not operate as a diſcontinuance, becauſe it paſſed no freehold, the freehold having been conveyed by the leaſe and releaſe before the fine was levied, which, therefore, only operated as a confirmation of the preceding eſtate. But the Court of King's Bench were unanimouſly of opinion, that the leaſe and releaſe, and fine, operated as one aſſurance, and deveſted the remainder in fee; ſo that the plaintiff could not maintain his ejectment, but was put to his formedon, becauſe the operation of the deeds and fine ought not to be divided and conſidered diſtinctly, as that would defeat the intention of the parties, and overturn a great number of family ſettlements; that the deeds

Doe ex dem. Odiarne v. Whitehead, 2 Burr. 704.

of

of leaſe and releaſe were incomplete until the fine was levied, and only operated as a declaration of the uſes of the fine, ſo that the eſtate tail paſſed by the fine; that this caſe was quite different from *Seymour*'s, for, in that caſe, Lord *Cheney* did not levy the fine until a year after the bargain and ſale was inrolled; and it was expreſsly found by the verdict that the bargainee entered, and was ſeiſed by force of the bargain and ſale only; ſo that the bargain and ſale was totally unconnected with the fine, nor did it appear that any fine was intended to be levied at the time when the bargain and ſale was executed.

1 Inſt. 332 *b.*

§ 44. It ſhould, however, be obſerved, that there can be no diſcontinuance of things lying in grant; ſo that, if a tenant in tail of a rent, advowſon or common, levies a fine, or makes a feoffment with warranty, there is no diſcontinuance, for nothing paſſes but during the life of the tenant in tail, which is lawful; and as no injury is done to the iſſue in tail, the remainder-man, or the reverſioner, there is no diſcontinuance.

1 Saund. R. 319. *n.* 1.

§ 45. A fine levied by a tenant for life, operates ſo as to diſplace or deveſt the remainders and reverſion, and, therefore, only leaves a right of entry in the perſons entitled to the remainder or reverſion; from which, it follows, that they muſt make an actual entry to avoid ſuch fine. But, where a tenant for life accepts a fine from a ſtranger, it has no operation, and the remainder-man or reverſioner is not bound to enter, but may avoid it by the plea of *partes finis nichil habuerunt.*

§ 46. With

§ 46. With reſpect to the mode of making an entry it muſt be on the land, and with an intention of claiming the freehold againſt the fine.

§ 47. A fine having been levied, the leſſor of the plaintiff proved that at the gate of the houſe in queſtion, he ſaid to the tenant, he was heir to the houſe and land, and forbade him to pay more rent to the defendant; but he did not enter into the houſe when he made the demand, on which it was agreed that the claim at the gate was not ſufficient. Then it was proved that there was a court before the houſe, which belonged to it, and that though the claim was at the gate, yet it was on the land and not in the ſtreet, and that was holden good without queſtion. Anon. Skin. 412.

§ 48. If a perſon is prevented by force or violence from entering on lands whereof a fine has been levied, he muſt then make his claim as near the land as he can, which in that caſe will be as effectual as if he had made an actual entry. Lit. f. 419. 1 Inſt 253 *b*.

§ 49. The delivery of a declaration in ejectment does not amount to ſuch an entry as will avoid a fine, even though the defendant appears to it, and confeſſes leaſe, entry, and ouſter, for there muſt be an actual entry made *animo clamandi:* whereas in an ejectment, there is only a fictitious or ſuppoſed entry, for the purpoſe of making a demiſe, and an actual entry muſt be made before the time when the demiſe is laid. 3 Burr. Rep. 1897. Doug. Rep. 468.

§ 50. Upon

Berrington v. Parkhurſt, 2 Stra. 1086. Andrews 125. 4 Brown's Ca. in Parl. 85.

§ 50. Upon a ſpecial verdict in ejectment, it was found that a fine had been levied of the premiſes in queſtion; and that the leſſor of the plaintiff entered into the premiſes with intent to make the demiſe in the declaration mentioned, but did not then make an actual entry for the purpoſe of avoiding the fine, but that after the demiſe laid the leſſor of the plaintiff made an actual entry. It was inſiſted for the defendants, 1ſt, That an actual entry was neceſſary to avoid the fine. And 2d, That the demiſe could not be laid before the leſſor had regained the poſſeſſion by the actual entry. The court was of opinion with the defendants on both theſe points; and on a writ of error in the Houſe of Lords it was argued for the plaintiff, that a fine with proclamations does not, by force of the ſtatute 4 *Hen.* 7. operate as a bar to conclude ſtrangers till after five years elapſe without entry or action; and therefore the verdict having found that the leſſor of the plaintiff made his firſt actual entry after the demiſe laid, he thereby avoided the operation of the fine, and was at liberty to lay the demiſe in his declaration, which is a mere fiction of law, as early as he thought fit after his right accrued, in the ſame manner as if his title had ſtood independent of ſuch fine, ſo rendered ineffectual within the plain intent of the ſtatute: and if ſuch entry was not good to maintain this demiſe, it muſt follow, that in every caſe where a fine is levied by a wrong-doer, and not diſcovered till two, three, or four years afterwards, the intermediate profits between the time of levying ſuch fine, and the entry of the lawful owner, muſt be abſolutely loſt, although the ſtatute gives five years to enter,

enter, and an entry at any time within the five years, purges the diſſeiſin and the wrong from the beginning, and brings the perſon ſo entering within the ſaving of the ſtatute, to all intents and purpoſes. On the other ſide it was ſaid, that an actual entry is neceſſary to avoid a fine, before an ejectment can be brought, and it muſt alſo be before the time of the demiſe; becauſe a fine is of that high nature, even at common law, that it diſpoſſeſſes all perſons claiming title, and conſequently a leaſe to found the ejectment upon, cannot be made till the leſſor regains the poſſeſſion. As to the entries found by the verdict to have been made ſubſequent to the time of the demiſe, they were of no uſe in the preſent caſe; for the ejectment being originally void, could not be made good by any ſubſequent act; and therefore whatever effect thoſe entries might have in other reſpects, they could not make the leaſe good. That the word *action* in the ſtatute 4 *Hen.* 7. has always been underſtood to mean real actions which were then in uſe: and it has often been determined, that the bringing an ejectment is not ſufficient to avoid a fine.

It appears from Sir *John Strange*'s report of this caſe, that the queſtions put to the judges were, 1ſt, Whether an actual entry was neceſſary to avoid a fine? 2d, Whether the demiſe being laid before the time of the firſt entry, the ejectment could be maintained? To the firſt queſtion they anſwered in the affirmative; to the ſecond in the negative; upon which the judgment was affirmed.

S. P. Doug. 484. 7 Term Rep. 732.

§ 51. No

2 Will. R. 45.

§ 51. No entry is neceſſary where the fine is levied without proclamations, for the ſtatute 4 *Hen.* 7. does not extend to ſuch a fine, and therefore it may be avoided at any time within twenty years.

1 Inſt. 258 *a.*

§ 52. The entry to avoid a fine muſt be made by the perſon who has a right to the land, or by ſome one appointed by him; for a perſon who has a right of entry may empower another to enter for him. But if a ſtranger makes an entry on lands whereof a fine has been levied, in the name of a perſon who has a right to the land, without any preceding command or ſubſequent aſſent, within five years, by the perſon having right, it will not be ſufficient; for the ſtatute 4 *Hen.* 7. bars all perſons who do not claim within five years, by which means an election is given to all thoſe who have a right at the time when a fine is levied to claim or not, and a ſtranger cannot make this election for them.

Pollard v. Luttrell, Poph. 108. Moor 457. 9 Rep. 106 *a.* Cro. Eliz. 561.

§ 53. A diſſeiſor levied a fine with proclamations, the diſſeiſee not knowing it; and a ſtranger made an entry within five years, to the uſe of the diſſeiſee, but the diſſeiſee did not aſſent to it, until the five years were expired. It was determined by all the Judges that the aſſent of the diſſeiſee to the entry, after the five years had expired, was not ſufficient to render it valid, becauſe the ſtatute of fines ought to be taken ſtrictly, being made for the purpoſe of repoſe and tranquillity.

§ 54. A perſon

§ 54. A perſon in remainder or reverſion, expectant on a leaſe for life or years, or the lord of a tenant by copy, may enter in the name of the tenant for life, the tenant for years or the copyholder, to ſave thoſe particular intereſts, as well as their own freehold and inheritance: and the entry of thoſe particular tenants will alſo ſave the rights of the lord, the remainder-man, or reverſioner, on account of the privity of eſtate which is between them. A guardian by nurture, or in ſocage, may alſo enter in the name of his ward to avoid a fine, and ſuch an entry will ſave his right. Shep. Tou. 33, 34. 9 Rep. 106 *a.*

§ 55. The entry of one joint-tenant, coparcener, or tenant in common, will be ſufficient to avoid the effect of a fine, as to the other joint-tenant, coparcener, or tenant in common.

§ 56. By the ſtatute 4 *Ann.* c. 16. ſ. 16. it is enacted, "That no claim or entry to be made of, or "upon any lands, tenements, or hereditaments, ſhall "be of any force or effect to avoid any fine levied, or "to be levied with proclamations, according to the "form of the ſtatute in that caſe made and provided, "in the Court of Common Pleas, or in the Courts "of Seſſions in any of the counties palatine, or in "the Courts of Grand Seſſions in *Wales*, of any "lands, tenements, or hereditaments; or ſhall be a "ſufficient entry or claim within the ſtatute of limitations, unleſs upon ſuch entry or claim an action "ſhall be commenced within one year next after the

" making of ſuch entry or claim, and proſecuted with " effect."

Plea. § 57. The proper mode of reverſing a fine for any defect in the record is, we have ſeen, by writ of error: but where a fine is void *ab initio*, either as to all mankind, or as to ſome particular perſons, its effects may then be avoided by plea.

§ 58. Thus, where none of the parties to a fine have an eſtate of freehold in the lands whereof it is levied, ſuch fine is totally void as to all ſtrangers, and may be avoided by pleading, *quod partes finis nec eorum aliquis tempore levationis finis, nihil habuerunt, nec eorum aliquis habuit, &c. ſed quidam J. S. cujus ſtatum ipſe habet.* This mode of avoiding a fine ſeems to have been already eſtabliſhed in the time of *Bracton: Excuſatur etiam qui quod clameum non appoſuerit, ſcilicet ubi finis ipſo jure ſit nullus, ut ſi factus fuit de tenemento quod alius tenuit, ut ſi ipſe qui debuit clameum appoſuiſſe, vel anteceſſor ſuus, fuit in ſeiſina de eadem re quando finis factus fuit, et non ille vel anteceſſor ſuus qui finem allegat.*

Dyer 215 *b.* Co. Read. 12. 2 Inſt. 523.

Bract. 436 *b.*

§ 59. The plea *quod partes finis nihil habuerunt*, might originally have been pleaded by any perſon who was not a party to the fine; and there is a very long caſe in the Rolls of Parliament, 14 *Ed.* 3. N° 31. in which it was determined, that a ſtranger ſhould be allowed this averment. But by the ſtatute 4 *Hen.* 7. parties and alſo privies to a fine are deprived of this plea; and as it is now determined, that the iſſue in

Rot. Parl. v. 2. p. 122.

tail are meant by the word privy, it follows, that they cannot avoid a fine on this ground.

§ 60. By the common law a fine might be avoided on account of any fraud in the parties who levied it. *Excuſatur etiam quis quod clameum non appoſuerit, ſi finis factus fuerit per dolum et fraudem vel alio modo in alterius præjudicium, quod finis tenere non debeat.* Averment of Fraud. Bract. 436 *b.* 437 *a.*

§ 61. Thus, in 29 *Eliz.* one *Hubert* was convicted in the Star Chamber upon a bill exhibited againſt him for procuring one *Webſter* to acknowledge a fine, in the name of *Alexander Gillibrand* (who was then beyond ſea). The ſentence was, that he ſhould be fined and impriſoned, and that the fine thus levied ſhould be avoided (if it could be ſo done) by entering a vacat on the roll, or otherwiſe as the Juſtices of the Common Pleas ſhould beſt approve; and if it could not be ſo made void, that then *Hubert*, by fine or otherwiſe, as *Gellibrand* might deviſe, ſhould re-convey the land to him and his heirs. Hubert's Caſe, Cro. Eliz. 531. 12 Rep. 123. 5 Rep. 68 *b.* Co. Read. 7.

§ 62. Soon after the reſtoration, doubts were entertained reſpecting the power of Parliament to ſet aſide a fine obtained by force and fraud.

A bill having been brought into the Houſe of Lords to vacate certain fines unduly procured to be levied by Sir *Edward Powell* and *Dame Mary* his wife, the Houſe commanded the Judges to deliver their opinions thereon in point of law: the Lord Chief Juſtice of the King's Bench delivered it as his opinion, and that Lords Jour. v. 11. p. 191. 12 Car. 2.

of all the reſt of the Judges, to be, "That they did "not find by any record or precedent in their law "books of any fine which had been perfected, that "had been vacated for fraud or force in Parliament, "or any other place." The queſtion was then put, whether the fine was obtained by force? and it was reſolved in the affirmative. The bill paſſed, but the following proteſt was entered, ſigned by Lord Chancellor *Hyde* and ſeveral other Lords, "That fines are "the foundations of the aſſurances of the realm, upon "which ſo many titles depend, and therefore ought "not to be ſhaken, nor hath there any precedent oc-"curred to us wherein any fines have been vacated "by judgment or act of Parliament, or otherwiſe "without conſent of the parties; the eye of the law "looking upon fines as things always tranſacted by "conſent, and with that reverence, that no averment "whatſoever ſhall be againſt them when they are per-"fected." In the Houſe of Commons counſel were heard for and againſt this bill, and the Houſe being ſatisfied that they had full power and juriſdiction of the cauſe, the bill paſſed.

Id. pa. 209.

Commons Jour. vol. 8. pa. 344. 13 & 14 Car. 2. c. 27.

3 Rep. 80 *a.* Shep. T. 18. Jenk. 254.

§ 63. A fine may alſo be avoided by an averment of fraud, in conſequence of the ſtatute 27 *Eliz.* c. 4. where it appears to have been levied to ſecret uſes, for the purpoſe of deceiving purchaſers; or by an averment of uſury under the ſtatute 13 *Eliz.* c. 8.

Courts of Equity.

§ 64. Although a fine duly levied is as effectual and binding in a court of equity as in a court of law, becauſe it is one of the common aſſurances

of the realm, and was originally inſtituted for the purpoſe of ſecuring thoſe who were in poſſeſſion of lands; yet if any fraud or undue practice appears to have been uſed in obtaining a fine, the Court of Chancery has then a power of relieving againſt it, as much as againſt any other conveyance; for although it might be extremely improper and inconvenient to admit of an averment in a court of common law, againſt a fine obtained by fraud, becauſe it would be dangerous to permit the evidence of a record to be queſtioned in any caſe whatever; yet as there is a method in which relief may be given in caſes of this kind, without contradicting the principles of the common law, it is highly proper that a court of equity ſhould adopt it, and the Lord Chancellor appears to have exerciſed this juriſdiction as early as the reign of Queen *Elizabeth*.

Day v. Hungate, 1 Roll. Rep. 115. Welby v. Welby, Tothil 99. 13 Vin. Ab. 373.

§ 65. The Court of Chancery however does not abſolutely ſet aſide a fine ſo obtained, nor does it ſend the party aggrieved to the Court of Common Pleas to get it reverſed; but it conſiders all thoſe who have taken an eſtate by ſuch a fine, with notice of the fraud, as truſtees for the perſons who have been defrauded, and decrees a re-conveyance of the lands, on the general ground of laying hold of the ill conſcience of the parties, to make them do that which is neceſſary for reſtoring matters to their ſituation. But with reſpect to any technical error in a fine, or irregularity of the commiſſioners who have taken the acknowledgment of it, it is a matter only cognizable in the Court of Common Pleas, becauſe a fine being of the ſame na-

Wright v. Booth, Tothill 101. St. John v. Turner, 1 Ab. Eq. 259. 1 Vezey 289.

ture as a judgment, is properly examinable in that court only where it is entered.

Coleby v. Smith, 1 Vern. 205.

§ 66. A bill was filed by one *Coleby*, to be relieved againſt a purchaſe made from the plaintiff's father, ſuggeſting that he had been circumvented and impoſed upon by the defendants. The defendants inſiſted on their purchaſe, and it appeared that there were, firſt, articles for the purchaſe under hand and ſeal, and ſome time after that, a conveyance actually made and executed in purſuance of theſe articles, and the purchaſe-money paid and ſecured; and after all this, a fine levied by the plaintiff's father to the purchaſer. Lord Keeper *North*, upon the hearing of the cauſe, ſet the purchaſe aſide, becauſe there appeared to be ſome art uſed to perſuade the plaintiff's father to ſell the lands.

Woodhouſe v. Brayfield, 2 Vern. 307.

§ 67. A perſon having prevailed on a woman to levy a fine of ſome houſes, and to execute a deed declaring the uſes thereof to himſelf and his heirs, it being proved that the woman, at the time of levying the fine, declared that ſhe muſt make uſe of ſome friend's name in truſt for herſelf, and ſhe having afterwards declared in her will, that ſhe only levied the fine for the better enabling her to diſpoſe of her eſtate, and having deviſed it to *J. S.* ſubject to the payment of her debts: the Court of Chancery decreed, not only that the lands were liable to the debts of the teſtatrix, but alſo that the perſon to whoſe uſe the fine was declared, ſhould convey the houſes to *J. S.* according to the will.

§ 68. Where

§ 68. Where a fine is levied by a perſon who has got into poſſeſſion under a forged deed, a court of equity will not allow it to have any operation. 2 Atk. 381.

§ 69. If tenants give a conditional poſſeſſion only, provided they may pay their rents to a third perſon, until a ſuit is determined: a fine levied under ſuch a poſſeſſion will not in a court of equity be allowed to have any operation. Idem 390.

§ 70. By the common law, if an infant or idiot has by any neglect or contrivance been permitted to levy a fine, his declaration of the uſes thereof will be good, ſo long as the fine remains in force; and if the fine is never reverſed, his declaration of the uſes will be binding and concluſive on him and his heirs for ever; becauſe the law will not preſume that a fine, which is a ſolemn act on record, has been levied by a perſon labouring under ſuch diſabilities, and therefore until the fine, which is the principal, is annulled, the declaration of the uſes thereof will remain good. Thus, ſtands the common law on this point; but as the Court of Chancery has, in many inſtances, compelled perſons who had obtained eſtates under a fine in a fraudulent manner, to re-convey them to thoſe who were really intitled thereto: ſo, that court will interpoſe its authority in caſes of this kind, and not ſuffer the declaration of uſes of a fine levied by an idiot to bar his heirs; as no ſpecies of fraud can be more evident, than that of obtaining a conveyance from a perſon of this deſcription. 2 Rep. 58 *a.* 10 Rep. 42 *b.* 12 Rep. 124. Hobart 224. 1 Vezey 304. Ruſhley v. Mansfield, Tothill 42.

Addiſon v. Dawſon, 2 Vern. 678. 2 Veſ. 403. 3 Atk. 313.

Thus, where one *Addiſon* by a firſt and ſecond inquiſition was found a lunatick in 1706 from the year 1689, without any intervals. The defendant had got a mortgage, and at laſt an abſolute purchaſe at great undervalue, by deeds, fines, and recoveries; the court ſet aſide the purchaſes.

§ 71. A court of equity will not ſuffer a fine and non-claim to bar any charge on lands, where the perſon who levied the fine had notice of ſuch charge.

Drapers' Company v. Yardley, 2 Vern. 662.

§ 72. Thus, where a perſon to whom lands were deviſed chargeable with legacies, levied a fine, on which there was five years non-claim, and afterwards granted a rent-charge and mortgaged the lands. It was decreed that the fine and non-claim were no bar to the legatees, becauſe the deviſee having no title but under the will, muſt have had notice of them.

1 Vern. 149.

§ 73. A fine levied by a truſtee will not be allowed to affect the intereſt of the *ceſtui que truſt*. Thus, in the caſe of *Bovey* v. *Smith*, the Lord Keeper put this caſe to Serjeant *Maynard*,—"*A.* ſeiſed in fee in truſt "for *B.* for full conſideration conveys to *C.* the pur- "chaſer having notice of the truſt; and afterwards "*C.* to ſtrengthen his own eſtate levies a fine. Whe- "ther *B.* the *ceſtui que truſt* be not in that caſe bound "to enter within five years? and the counſel were all "of opinion, that he was not; for *C.* having pur- "chaſed with notice, notwithſtanding any conſidera- "tion paid by him, was but a truſtee for *B.* and ſo "the eſtate not being diſplaced, the fine cannot bar."

§ 74. So

§ 74. So in the caſe of *Shields* v. *Atkins*, Lord *Hardwicke* ſays, it would be dangerous, where a perſon enters on the foot of a truſt, and never makes any declaration of his having performed the truſt, to conſtrue this ſuch an entry, as that a fine and non-claim afterwards would be a bar. And in the caſe of Lord *Pomfret* v. Lord *Windſor*, his Lordſhip obſerved, that a court of equity would not ſuffer a fine levied by a truſtee, to bar an equitable right: and that if a practice of this kind was ſuffered to prevail, a court of equity might as well be aboliſhed by act of Parliament.

3 Atk. 563.

2 Vezey 482. 2 Atk. 631. S. P.

§ 75. It is a principle of equity, that if a ſtranger enters upon an infant's eſtate and receives the profits, he ſhall be looked upon as a truſtee for the infant; and that the laches of a truſtee ſhall not prejudice the *ceſtui que truſt*.

1 Vern. 295. 2 Vern. 342.

§ 76. Thus, where *A.* deviſed lands to truſtees until his debts were paid, then to an infant and his heirs, the defendant entered on the eſtate and levied a fine; five years paſt; the infant brought an ejectment as ſoon as he had attained his full age, but was barred by the fine and non-claim. He then brought his bill in Chancery, where it was determined that although the fine and non-claim was a good bar at law, the legal eſtate being in the truſtees who were of full age and ought to have entered, yet that the plaintiff ought not to ſuffer for their laches, being an infant. The court decreed the poſſeſſion, and an account of profits, declaring the fine and non-claim ſhould not run upon the

Allen v. Sayer, 2 Vern. 368.

the truſt in the infant's minority, nor he ſuffer for the laches of his truſtee.

1 Vent. 82.
1 Lev. 272.
2 Vezey 482.

§ 77. A mortgagor cannot bar a mortgagee by a fine and non-claim: for although the mortgagee be in reality out of poſſeſſion, yet when that is done by the conſent of both parties, and the nature of the contract requires it ſhould be ſo, while the intereſt is paid: It would be againſt the original deſign of the contract, that any act of the mortgagor, except the payment of the money, ſhould deprive the mortgagee of his ſecurity.

Weldon v. Dux. Ebor. 1 Vern. 132. 2 Vern. 89. Contra.

§ 78. A fine and non-claim by a mortgagee in poſſeſſion will not, from the ſame principle, bar the equity of redemption. Thus, where a fine and non-claim was pleaded to a bill brought for the redemption of a mortgage, the plea was over-ruled.

Goodrick v. Brown, 1 Chan. Ca. 49. 2 Vern. 56.

§ 79. Where a fine is levied purſuant to a decree of the Court of Chancery, for a particular purpoſe, that Court will not permit it to operate farther than the decree directs.

Trevor v. Trevor, Tit. 32. ch. 25. ſ. 36.

§ 80. The intention of marriage articles is ſo far conſidered in equity, that if a fine be levied of the lands comprehended in ſuch articles to different uſes, a court of equity will compel a conveyance of the lands to the uſes of the marriage articles, notwithſtanding the fine.

§ 81. The

§ 81. The plea of a fine and long poſſeſſion under it, is not a good bar to a bill brought for a diſcovery of the deeds, declaring the uſes of ſuch fine.

§ 82. *William* Lord *Brereton*, being ſeiſed in fee of the impropriate rectory of *Middlewich*, and of the advowſon and vicarage of the ſaid church, as appendant to the rectory, agreed with *Robert Lowe* to convey the ſame to him; and, in purſuance of this agreement, the ſaid *William* Lord *Brereton* and *Elizabeth* his wife, and *William*, their ſon and heir apparent, in 1664, levied a fine *ſur conuſance de droit come ceo*, &c. in conſideration of 1000 *l.* therein mentioned to be the purchaſe-money, in the court of the county palatine of *Cheſter*, to the ſaid *Robert Lowe*, and to *Edward Minſhall*, *Gabriel Hodgson*, and *John Wilſon*, (who all three died in *Lowe*'s life-time), and to the heirs of the ſaid *Robert Lowe*. About the year 1702, *Samuel Lowe*, the ſon and heir of *Robert Lowe*, preſented a clerk to the vicarage of *Middlewich*, who was inſtituted and inducted, and continued in poſſeſſion till his death, which happened in the year 1718, when *Francis* Lord *Brereton*, preſented his clerk to the vicarage, who was inſtituted and inducted. *James Lowe*, the reſpondent's brother, brought a writ of *Quare Impedit*, but, before the matter was determined, the incumbent died, and the reſpondent *Lowe* preſented his clerk, who was inſtituted and inducted. And the appellants brought their writ of *Quare Impedit*, to recover that turn of preſentation, claiming the ſame under a conveyance from the family of *Brereton*. The reſpondent *Lowe* having pleaded his title to the rectory and vicarage under

Holt v. Lowe, 4 Brown 253.

under the purchaſe and fine above mentioned, the appellants, in *Eaſter* term 1734, exhibited their bill in the Court of Exchequer againſt the reſpondent, ſetting forth, that *William* Lord *Brereton* being minded to ſell the glebe and tithes of the ſaid rectory, the reſpondent's grandfather, who was then bailiff to Lord *Brereton*, prevailed on him, his lady and ſon, for ſome ſmall ſum of money, to ſell and convey to the ſaid *Robert Lowe* the glebe lands and tithes of the greateſt part of the ſaid pariſh; and other parcels of the ſaid tithes were about the ſame time purchaſed by ſeveral other perſons, and conveyed to them, and the ſaid *Robert Lowe*, as part of the conſideration for the purchaſe of the ſaid tithes, agreed to take upon himſelf the payment of the ſtipend of nineteen marks to the vicar; but neither he nor his ſon ever pretended or inſiſted on any right to the advowſon of the vicarage, nor ever attempted to preſent thereto, except in the year 1702, when *Samuel Lowe*, taking advantage of *John* Lord *Brereton*'s being then under a commiſſion of lunacy, preſented a clerk. The appellants, therefore, prayed, that the reſpondent might diſcover whether there was not ſome deed wherein the uſes of the fine were declared, and whether a ſubſequent fine of particular parcels of the rectory was not levied in 1667, and deeds executed declaring the uſes thereof.——In bar to this diſcovery, the reſpondent pleaded the purchaſe ſo made by *Robert Lowe* his grandfather, and the fine thereupon levied to him of the ſaid rectory, and the advowſon of the ſaid vicarage; and alſo the payment of the ſaid ſum of 1000 *l.* the purchaſe-money mentioned in ſuch fine. That proclamations were duly made on the ſaid fine, and that no

claim

claim was made to the premiſes within five years next after. That the reſpondent, and thoſe claiming under him, enjoyed the premiſes for fifty years and upwards, and inſiſted on the ſtatute of limitations.

On the 9th of *November* 1734, this plea came on to be argued before the barons, when they ordered that the plea ſhould be allowed. An appeal was then brought in the Houſe of Lords, and, on behalf of the appellants, it was argued, that the fine inſiſted by the plea to have been levied to *Robert Lowe*, *Minſhall*, *Hodgson*, and *Wilſon*, was not levied with an intention to convey the rectory to the conuſees for their own uſe, but only to clear the title to the rectory, which was then intended to be ſold in parcels; and as there did not appear to be any declaration of the uſes of this fine, it would, by the rules of law, reſult to the conuſors. That the end of the bill was to diſcover the intent and deſign of the ſaid fine, and of a ſubſequent fine, ſaid to have been levied in 1667 to the ſaid *Robert Lowe*, of divers parcels of the ſaid rectory; and by the diſcovery of this ſecond fine, and the uſes of it, and the conſideration of ſuch conveyance, to ſhew that the uſes of the firſt fine did reſult to the conuſors, or at leaſt, as to ſuch parts of the rectory as were not particularly conveyed by the ſecond fine, and the deeds declaring the uſes of it; and, therefore, the firſt fine ought not to have been pleaded in bar to ſuch diſcovery, without a denial of the particular circumſtances charged by the bill, as an evidence of ſuch reſulting uſe. That the reſpondent, by not anſwering or denying the ſeveral charges in the bill, touching the ſecond fine, and the declaration

declaration of its uſes, did implicitly admit the ſame, and that the advowſon of the vicarage was not comprized therein; and this admiſſion was a ſtrong evidence againſt him to ſhew, that the firſt fine was levied only for the purpoſes above mentioned, and that nothing more was intended to paſs to his anceſtor, than what was particularly comprized in the ſecond fine, and the declaration of the uſes thereof. That it did not appear by the plea, what was the real purchaſe-money of the advowſon, nor that the ſame was paid by *Robert Lowe*, the reſpondent's anceſtor. That the appellants and the reſpondent derived under the ſame title, and the right of the appellants to the advowſon appeared from the reſpondent's own conveyances; the pretence, therefore, of his anceſtor's being a purchaſer, without any notice of the appellant's title, was without foundation. And as to the quiet enjoyment, the fine and non-claim, and the ſtatute of limitations, ſet up as a bar to the diſcovery ſought by the appellants, it was ſaid, that as to the glebe, and ſuch part of the tithes, parcel of the ſaid rectory, as the reſpondent claimed, there might have been a long and quiet poſſeſſion, nor was his title thereto at all impeached by the appellant's bill; but as to the advowſon of the vicarage, the only evidence of enjoyment inſiſted on by the reſpondent, was a preſentation about the year 1702, which was during the lunacy of Lord *John*; and, ſince that time, Lord *Francis*, his heir, preſented the laſt incumbent, and regained the poſſeſſion of the vicarage. It was, therefore, hoped, that the ſaid plea ſhould not bar the appellants of a full diſcovery of the reſpondent's title, but that the order for allowing the ſame ſhould be reverſed.

verſed. On the other ſide, it was contended, that *Robert Lowe*, the reſpondent's grandfather, and under whom he claimed, was a purchaſer of the rectory and the advowſon of the vicarage, by the fine levied in 1664, for 1000 *l.*, without any notice of any other title; and, therefore, by the known and eſtabliſhed rules and practice of courts of equity, the reſpondent ought not to be obliged any further to diſcover or diſcloſe his title; nor were the appellants entitled to the aid of a court of equity in reſpect to ſuch title. That by the fine, proclamations, and non-claim thereupon, and by the length of peaceable poſſeſſion and enjoyment, which the reſpondent's grandfather, father, and brother, and thoſe claiming under them, had ſucceſſively of the ſaid advowſon, under the ſaid fine and purchaſe; the title under which the appellants, by their bill, claimed the ſame, was utterly and effectually barred and defeated both at law and in equity; and, therefore, the order for allowing the plea ought to be affirmed, and the appeal diſmiſſed with coſts. After hearing counſel on this appeal, it was ordered and adjudged, that the order therein complained of, ſhould be reverſed; and that the plea ſhould ſtand for an anſwer, with liberty to except ſo far, as to oblige the reſpondent to diſcover any conveyance or conveyances made by *William* Lord *Brereton* and *Elizabeth* his wife, and *William Brereton* Eſq. their ſon, or any or either of them, to *Robert Lowe*, the reſpondent's grandfather, alone, or jointly, with any other perſon or perſons; and to diſcover any deed or deeds, declaring the uſes of a fine, in the pleadings mentioned to be levied in the 16th year of King *Charles* II. or declaring the uſes

of

of a fine in the pleadings alſo mentioned to be levied in the year 1667.

§ 83. Although a bill, in equity, is not ſuch an action as will avoid a fine, if the ſubject-matter of the ſuit be of legal juriſdiction; yet ſtill, in ſome inſtances, the filing a bill in a court of equity, will prevent the bar ariſing from a fine and non-claim; and, in caſes of this kind, the court will direct a trial at law, with an order, that the defendant ſhall not ſet up the fine in bar of the plaintiff's claim, upon the ſame principle that a court of equity ſometimes directs that the defendants, in a ſuit at law, ſhall not plead the ſtatute of limitations.

2 Atk. 389, 390.

§ 84. Sir *John Thornycroft* Bart. being entitled to the remainder in fee of the eſtates in queſtion, expectant on the deceaſe of his ſiſter *Elizabeth*, the then wife of General *Handaſyde*, deviſed the ſame to *Henry Forſter* in fee. After the deceaſe of Sir *John Thornycroft*, diſputes aroſe between Mrs. *Handaſyde*, who was heir at law of Sir *John Thornycroft* and Mr. *Forſter*, reſpecting the validity of this will, which were compromiſed, and Mr. *Forſter*, in conſideration of 630 *l.*, conveyed all his intereſt in the eſtates deviſed by the ſaid will to General *Handaſyde* and his wife in fee as joint-tenants. Mrs. *Handaſyde* ſurvived her huſband, and, having no iſſue, ſhe deviſed among other eſtates, "her "eſtate and manor of *Stockwell* in the pariſh of *Lam-*"*beth*, in the county of *Surry*, and all thereunto be-"longing, to *Henſhaw Thornycroft*, and his heirs male, "and appointed him her executor." Upon the death

Pincke v. Thornycroft, 1 Bro. Rep. 289. 4 Bro. Parl. Ca. 9.

of

of Mrs. *Handaſyde*, *Henſhaw Thornycroft* entered into poſſeſſion of all the eſtates whereof ſhe was ſeiſed, among which was a farm ſituated in the pariſh of *St. Mary Newington*, but which was not within the manor of *Stockwell*, and therefore did not paſs by the will, and in *Hilary* term 1773, levied a fine and ſuffered a recovery of all thoſe eſtates, in order to bar the intail. Previous to this, *Elizabeth Pincke* and *Ann Thornycroft*, who were the heirs at law of Mrs. *Handaſyde*, filed their bill in the Court of Chancery againſt *Henſhaw Thornycroft*, praying, that the ſaid *Thornycroft* might ſet forth the dates and ſhort contents of all the deeds, evidences, and writings in his cuſtody or power, relating to the eſtates whereof Mrs. *Handaſyde* died ſeiſed; and that he might likewiſe ſet forth and diſcover of what lands of the ſaid Mrs. *Handaſyde* he was in poſſeſſion, which were not compriſed in her will, and for an account of the rents and profits of the ſaid premiſes received by him ſince the deceaſe of Mrs. *Handaſyde*, and for a delivery of all deeds relating thereto. The defendant, by his anſwer, denied being in poſſeſſion of any eſtates belonging to Mrs. *Handaſyde*, but what were compriſed in her will. The heirs at law ſoon after diſcovered, that the farm at *Newington* was not deviſed by the will, and, therefore, brought an ejectment for the recovery of it. Notice of trial having been given juſt before the ſummer aſſizes 1778, a few days before the trial was to come on, the ſolicitor for the defendant informed the ſolicitor for the plaintiff of the will of Sir *John Thornycroft*, and that the production of that will, and ſetting up the title of *Henry Forſter* under it, would nonſuit the plaintiff in ejectment,

ment, but did not mention the fine or the deed by which *Forſter*'s title was conveyed to Mrs. *Handaſyde*, that deed being in fact not then diſcovered. The heirs at law gave notice of trial for the *Lent* aſſizes 1779, when *Henry Thornycroft* ſet up the fine and non-claim; and there having been no actual entry, the plaintiffs were nonſuited. Upon this, the plaintiffs filed a bill of revivor and ſupplement, praying, that under theſe circumſtances, the defendants might be reſtrained from ſetting up the fine in any manner to the prejudice of the plaintiffs. The caſe was heard before the Lords Commiſſioners, *Loughborough*, *Aſhburſt*, and *Hotham*; and on behalf of the plaintiffs it was contended, that they ſhould have proceeded to trial at the Summer aſſizes 1778, which was before the expiration of the five years, if they had not been prevented by the information of the ſolicitor; and, therefore, this was a proper caſe for the interference of a court of equity. They inſiſted further, that the filing of the bill in the Court of Chancery was of itſelf ſufficient to prevent the bar, ariſing from the fine and non-claim taking place.

For the defendants, it was urged, that there was no impropriety in the ſolicitor's conduct; that the court would not interfere to prevent the operation of a fine, unleſs in caſes of fraud; and that the bill being, in ſubſtance, a mere bill for diſcovery, could not operate to prevent the bar ariſing from the fine.

Lord *Loughborough*.— "If it were made out that "the plaintiffs were prevented from trying their cauſe

" by fraud, I ſhould think, under the principles of " this court, the defendants ought to be reſtrained " from ſetting up the fine as a bar; but here the plain- " tiffs take it for granted, that a bill filed in this court " for any purpoſe, will prevent the ſtatute of limita- " tion, or a fine barring. All legal intereſts are bound " by the fine; if the ſubject-matter of the ſuit be of " legal juriſdiction, the bringing a ſuit in equity will " not bar the operation of the fine. If a demand of " a debt be made here, if it be a legal debt, this court " being applied to for a diſcovery, will not prevent the " ſtatute of limitations from running; but if it be for " payment out of aſſets, for which this is the proper " juriſdiction, there the filing of the bill is the com- " mencement of a proper ſuit. I do not ſay, that a " caſe may not exiſt where the bad faith of par- " ties may make a ground to prevent a fine from bar- " ring; but here was only a communication of the " truth of the caſe; the attorney ſtated all he knew: " it was not his duty to give notice of the fine: it was " not in proof that it was in conſequence of this they " did not try the cauſe. It was their own judgment " that decided upon it. A legal bar has taken place " in conſequence of a legal proviſion, whether that " proviſion be wiſe or not, it muſt bind. No hard- " ſhip has occurred, in conſequence of which they can " ſay, that in conſcience the fine ſhould not be ſet up. " This is a legal title, over which this court has no ju- " riſdiction, and no fraud has intervened. The bill " muſt therefore be diſmiſſed."

Lord Commiſſioner *Aſhburſt.*— " I am of the ſame " opinion,—where a bill is filed, with a prayer for " equitable relief, the policy of the law ſuſpends the " ſtatute of limitations; juſt as in the caſe of the com- " mencement of an action. But, with reſpect to a " fine, the caſe is different; the bringing an action is " not ſufficient to bar the operation without an actual " entry; no more can the bringing a ſuit here be ſo, " unleſs the entry was prevented by fraud. In any " other caſe, the filing the bill cannot prevent the bar, " and, in this caſe, there was no fraud, but a fair " diſcloſure."

Lord Commiſſioner *Hotham.*— " If the filing of " the bill is not a ſufficient bar, it will ſtand on the " circumſtances of the caſe. It was a mere bill of " diſcovery, which is not ſufficient. If the circum- " ſtances are ſuch, that there had been an impoſition " on the party, I think the court ſhould interpoſe; but " it was a fair candid converſation." The bill was diſmiſſed.

An appeal was brought from this decree to the Houſe of Lords; and, on behalf of the appellants, it was ſaid, that it belongs to the juriſdiction of courts of equity, not only to give relief where the party entitled to the lands has a title only in equity, but alſo where the plaintiff in equity has the legal eſtate, and can recover at law, provided the deeds which are evidence of his title are in the hands of the defendant in poſſeſſion of the lands. The court, in ſuch caſes, relieves, by de-

creeing a production of the deeds upon a trial at law, by reſtraining the defendant from ſetting up ſatisfied terms; and (in caſe an account of the rents is alſo prayed) will, after a recovery at law, by the aid of the court, decree an account of rents and profits. In like manner, where the plaintiff has the title at law, and can make it out at law, without any aid from deeds in the defendant's hands, yet, if the defendant has in his hands an inſtrument which will defeat the plaintiff's legal title, and has alſo another inſtrument in his hands which will reſtore the plaintiff's title, equity will either decree the defendant not to give the firſt inſtrument in evidence at law, or to produce both. This is the preſent caſe: for the plaintiffs, as heirs of *Elizabeth Handaſyde*, could make out their title at law to the lands, which did not paſs by her will, without any aid, by proving their pedigree: but it was in the power of the defendants to nonſuit the plaintiffs, by ſhewing, that Sir *John Thornycroft* was in his life-time ſeiſed of the eſtate in queſtion, and that he deviſed it to *Forſter*, whereby *Elizabeth*, his ſiſter and heir at law, was diſinherited. But by the conveyance of 1745 from *Forſter* to *Elizabeth* in fee-ſimple, and the production of it at law, the plaintiffs would be reinſtated in their title as heirs to *Elizabeth*. The original bill was brought for a production and inſpection of all the title-deeds by the heirs of *Elizabeth Handaſyde* againſt the deviſee, to which production the heir was entitled. And the plaintiffs preſuming that ſome aid of the court might appear to be finally neceſſary to try the title at law, the bill prayed an account of rents and profits and delivery of the

deeds belonging to the deſcended eſtates. In the courſe of purſuing and obtaining this diſcovery, it came out, that Sir *John Thornycroft* the ſon made a will, and deviſed to *Forſter*, and it alſo came out by the laſt anſwer, that *Forſter* had conveyed to *Elizabeth Handaſyde* in fee. It alſo came out, that the lands in queſtion were compriſed in an old ſettlement 1722, and in a term of five hundred years thereby created for raiſing annuities, which have been ſatisfied, but the term remained outſtanding; ſubject to which term, Sir *John Thornycroft*, the ſon, took the lands in queſtion. So that it was undoubted, that if there were no other circumſtances in the caſe, the court had a juriſdiction, and ſhould have decreed upon the hearing of the cauſe, that the bill ſhould be retained, with liberty for the plaintiff to bring an ejectment, that the defendants, the deviſees, ſhould not ſet up the term of five hundred years; and, in caſe the will of Sir *John Thornycroft* the ſon ſhould be produced in evidence, the defendants ſhould likewiſe produce at the trial the deed of 1745, and that all further directions ſhould be reſerved till after the trial was had. The only circumſtances in the preſent caſe which differed from the above, and which were the grounds of diſmiſſing the bill, were, that in *Hilary* term 1773, (the next after the death of *Elizabeth Handaſyde*), the deviſee levied a fine of all the deviſed eſtates, and alſo of the deſcended eſtates, (having entered upon both immediately after her death). The original bill was filed in 1776. The five years non-claim ran from *Michaelmas* 1778. In *October* 1781, the anſwer came in which diſcovered the deed

of

of 1745, and admitted it to have been in the hands of the deviſee from the time of the death of *Elizabeth Handaſyde;* and the anſwer alſo ſtated and inſiſted upon the fine and non-claim. The cauſe was heard the firſt of *July* 1783, at which time the court ſhould have added to the directions above mentioned, that the fine and non-claim ſhould not be inſiſted upon at law, inſtead of diſmiſſing the bill upon the ground of ſuch fine and non-claim only, as the non-claim had elapſed pending the ſuit in Chancery; and, therefore, the court ought not to have permitted the defendant to take advantage of it at law. For a court of equity will not ſuffer the rights of the parties to be changed, pending the ſuit in a caſe within the juriſdiction of the court, and where the court can relieve; therefore, if a truſt eſtate is before the court in a *lis pendens*, and a ſale be made of the truſt eſtate, without actual notice of the cauſe to the purchaſer, the court, at the hearing, will decree the relief againſt the purchaſer, which the plaintiff in the cauſe was entitled to. But it is otherwiſe after the cauſe is at an end, for then the party muſt have expreſs notice of a decree, as he muſt of a judgment at law, to affect him with equity. So, in the caſe of a fine, equity will not ſuffer a non-claim completed, pending the cauſe, to prevent the court from doing equity; otherwiſe, (as Lord *Hardwicke* expreſſed it in 2 *Atk.* 390.), it would trip up the juriſdiction of this court, if you will not allow (where it is a proper matter of equity) a bill to prevent the running of a fine. So where a court of equity has directed an action, the defendant has been reſtrained from ſetting

up the ſtatute of limitations, which has run pending the ſuit in equity.

On the other ſide, it was contended, that the title of the appellants, if they ever had any, was a clear title at law; it needed no aſſiſtance of a court of equity to bring it to a fair diſcuſſion: and, accordingly, the mother of the appellant *Pincke* and the appellant *Thornycroft* brought an ejectment, which might have been fairly tried without any ſuch aſſiſtance; and there was now no obſtacle to a legal determination of the rights of the appellants, except the fine. That there was no ground for a court of equity to interpoſe, to remove the legal bar created by the fine. It was apprehended the farm at *Newington* was deviſed by the will; but, ſuppoſing the contrary, there was not in the caſe any circumſtance which could give a court of equity a controul over the legal title of the reſpondents, nothing which could form a legal obligation upon their conſcience, not to ſet up the fine. The appellants attempted to impute fraud to the reſpondents or their ſolicitor; but the bill did not ſtate ſuch a caſe as warranted the imputation, much leſs was it made out in proof. A fine was a matter of record open to the inſpection of every one; the Legiſlature had given it an operation to bar all claims not aſſerted in due time, and it was, therefore, the duty of every perſon having a claim, to inform himſelf whether there might be ſuch an impediment to the aſſertion of it. Not diſcloſing to an adverſary that a fine had been levied, which might in time be a bar to his claim, could not be deemed a fraud,

fraud. It was endeavoured, therefore, to give to the converſation of the ſolicitor for the defendant and the ſolicitor for the plaintiff in the ejectment, (of which, there was no evidence but the anſwers) ſuch a turn as might make it appear ſomething like fraud. But the ſolicitor for the defendant merely mentioned a claim made by perſons to whoſe apparent title he was then unable to give any anſwer, and which had therefore excited in his mind much apprehenſion for his client's title; and what he communicated was not only true, but (according to the information he then had) was the whole truth, though a ſubſequent accidental diſcovery put an end to this alarming claim, which, if it had prevailed, was ſuperior to the title of the heirs, as well as of the deviſee of Mrs. *Handaſyde*. It was true, the heirs countermanded their notice of trial of the ejectment, but their own judgment decided their conduct. It was aſſerted by the appellants, that if the ejectment had proceeded to trial, the fine muſt have been diſcovered, and, five years not having then elapſed from the laſt proclamation, the heirs might have entered to avoid the fine. But this aſſertion was not founded in truth; the will of Sir *John Thornycroft* would have been a ſufficient defence, and there would have been no neceſſity for ſetting up the fine.

It was ordered and adjudged, "That the ſaid decree "or order of diſmiſſion complained of in the ſaid ap- "peal ſhould be reverſed. And it was further or- "dered and adjudged, that the bill ſhould be retained "for twelve months, and that the plaintiffs ſhould be

"at

" at liberty, in the meantime, to bring ſuch action or " actions at law as they ſhould be adviſed, *&c.* And " it was further ordered and adjudged, that the ſaid " defendant *Edward Thornycroft* ſhould not inſiſt in " ſuch action or actions, or on any trial to be had " thereon, on the fine mentioned in the pleadings, or " on any non-claim which had enſued thereon, or any " other fine or non-claim which might have incurred " ſince filing the original bill."

TITLE XXXVI.

COMMON RECOVERY.

CHAP. I.
Of the Origin and Nature of a Common Recovery.

CHAP. II.
Of the Writ of Entry.

CHAP. III.
Of the Tenant to the Præcipe.

CHAP. IV.
Of Voucher.

CHAP. V.
Of Judgment.

CHAP. VI.
Of Execution.

CHAP. VII.
In what Courts and of what Things a Recovery may be suffered.

CHAP. VIII.
Of the Parties to a Recovery.

CHAP. IX.
Of the Amendment of Recoveries.

CHAP.

CHAP. X.

Of the Operation of a Recovery in barring Eſtates Tail, Remainders, and Reverſions.

CHAP. XI.

Of the Effect of a Recovery in barring other Eſtates and Intereſts.

CHAP. XII.

Of ſome other Effects of a Recovery.

CHAP. XIII.

What Perſons, Eſtates, and Intereſts, are not barred by a Recovery.

CHAP. XIV.

How Recoveries may be reverſed and avoided.

CHAP. I.

Of the Origin and Nature of a Common Recovery.

§ 1. *Origin of a Recovery.* | § 8. *Manner in which it is ſuffered.*

Section 1.

Origin of a Recovery.

A RECOVERY in its moſt extenſive ſenſe, is the reſtitution of a former right, by the ſolemn judgment of a court of juſtice; and judgments, whether obtained after a real defence made by the tenant, or upon his default, or feint plea, have equally the ſame force and efficacy to bind the right of the land ſo recovered, and to veſt a free and abſolute eſtate in fee ſimple in the recoveror.

§ 2. A com-

§ 2. A common recovery is a judgment obtained in a fictitious ſuit brought againſt the tenant of the freehold, in conſequence of a default made by the perſon who is laſt vouched to warranty in ſuch ſuit. Bac. Tracts 148.

§ 3. A common recovery departs ſo far from the original modes of transferring property, and is in its proceſs ſo complicated and artificial that if we had no hiſtorical evidence of the time when it was firſt adopted among the common aſſurances of the law, we might ſafely pronounce it to be in ſome reſpects a modern invention; but the fact is well known that we are indebted to the ingenuity of the eccleſiaſtics for the introduction of common recoveries, in order to evade the ſtatutes of *mortmain*, by which they were prohibited from purchaſing or receiving, under pretence of a free gift, any lands or tenements whatſoever. To effect this purpoſe the religious houſes uſed to ſet up a fictitious title to the lands intended to be given or ſold, and brought an action againſt the tenant to recover them; the tenant by colluſion made no defence, whereby judgment was given for the religious houſe, which then recovered the lands by ſentence of law, upon a ſuppoſed prior title.

Although proceedings of this kind were carried on by a ſpecies of conventional fraud, between the religious houſe and the tenant of the land, yet the judges held, that in theſe caſes the religious communities did not appropriate ſuch lands *per titulum doni vel alterius alienationis*, as the ſtatute of *mortmain* expreſſes it, nor that they were within the words *aut alio quovis modo arte* Plowd. 43.

arte vel ingenio; for as recoveries were profecuted in a courſe of law, they were preſumed to be juſt; and it was accordingly held by the courts of juſtice that they were not within the ſtatute.

§ 4. The notoriety and evidence which attended feigned recoveries was ſuch, that they were not uſed by the eccleſiaſticks alone, but were ſoon adopted by lay perſons, as a common mode of transferring lands. Thus it appears by the ſtatute of *Glouceſter*, 6 *Ed.* 1. that feigned recoveries were at that time in conſtant uſe, for it is provided by the 11th chapter of that ſtatute, that a termor for years might falſify a feigned recovery, ſuffered by the owner of the inheritance.

§ 5. The want of moderation on the part of the eccleſiaſticks counteracted the effects of their ingenuity; for being gratified by the ſucceſs of their practices, they had ſuch frequent recourſe to feigned recoveries as to occaſion a parliamentary interference: hence by the ſtatute of *Weſtminſter* 2. 13 *Ed.* 1. c. 32. it was enacted, that in all caſes where eccleſiaſtical perſons recovered lands by default, a jury ſhould try the right of the demandants to the land, and if the religious houſe was found to have a title, they ſhould recover ſeiſin, otherwiſe it ſhould be forfeited to the immediate lord of the fee, in the manner directed by the ſtatute of mortmain.

§ 6. In conſequence of this reſtraint, feigned recoveries ſeem to have been diſuſed for a conſiderable time, nor were they again brought into general practice

dce until ſome centuries afterwards, when they were reſumed as a mode of evading the ſtrictneſs of the ſtatute *de donis conditionalibus*.

§ 7. Many attempts were made by the people to procure a legiſlative repeal of this offenſive ſtatute, but they were conſtantly and ſucceſsfully oppoſed by the great barons; however, as the inconveniencies ariſing therefrom were ſo manifeſt, the ingenuity of the judges was continually exerted in contriving different modes to evade it; at length a caſe aroſe in the 12 *Edw.* 4. in which it was in effect determined, upon principles which will be explained in a ſubſequent chapter, that a common recovery ſuffered by a tenant in tail ſhould operate as an effectual bar to his eſtate tail, and alſo to all the remainders and the reverſion depending thereon. From that time common recoveries have become extremely frequent, and have ever ſince been conſidered as common aſſurances, by means of which, tenants in tail are enabled to diſpoſe of their eſtates tail, or to convert them into eſtates in fee ſimple.

Tit. 2. ch. 2. ſ. 32.

Willes Rep. 451.

§ 8. A common recovery being a judgment obtained in a real action, although it be fictitious, yet the ſame mode of proceeding muſt be purſued, and all thoſe forms ſtrictly adhered to which are neceſſary to be obſerved in an adverſary ſuit; for, as *Pigot* obſerves, though common recoveries are to ſome intents deemed fictitious proceedings, yet it is neceſſary there ſhould be *actores fabulæ*.

Manner in which it is ſuffered.

§ 9. The

§ 9. The firſt thing therefore requiſite to be done, in ſuffering a common recovery, is, that the perſon who is to be the demandant, and to whom the lands are to be conveyed, ſhould ſue out a writ or *præcipe* againſt the tenant of the freehold; whence ſuch tenant is uſually called the tenant to the *præcipe*.

§ 10. In obedience to this writ, the tenant of the freehold appears in court, either in perſon or by his attorney; but inſtead of defending the title of the land himſelf, he calls on ſome other perſon, who, upon the original purchaſe, is ſuppoſed to have warranted the title, and prays that ſuch perſon may be called in to defend the title which he warranted, or otherwiſe to give the tenant lands of equal value to thoſe which he ſhall loſe by defect of his warranty. This is called the voucher, *vocatio*, or calling to warranty.

1 Inſt. 101 *b*. § 11. The perſon thus called to warrant the title (who is uſually called the vouchee) appears in court, is impleaded, and enters into the warranty, by which means he takes upon himſelf the defence of the land. The demandant then deſires leave of the court to imparle or confer with the vouchee in private, which is granted of courſe. Soon afterwards the demandant returns to court, but the vouchee diſappears, or makes default; in conſequence of which it is preſumed by the court that he had no title to the lands demanded in the writ, and therefore could not defend them, whereupon judgment is given for the demandant, now called

called the recoveror, to recover the lands in queſtion againſt the tenant, and judgment is alſo given for the tenant to recover againſt the vouchee, lands of equal value, in recompence for the land ſo warranted by him, and now loſt by his default.

§ 12. This is called the recompence, or recovery in value; but as it is cuſtomary to vouch the cryer of the Court of Common Pleas, who is hence called the common vouchee, the tenant can only have a nominal recompence for the land thus recovered againſt him by the demandant.

§ 13. A writ of *habere facias ſeiſinam* is then ſued out, directed to the ſheriff of the county in which the lands thus recovered are ſituated; and on the execution and return of this writ, the recovery is compleated.

§ 14. The recovery here deſcribed is with ſingle voucher; but a recovery may, and is frequently ſuffered with double, treble, or farther voucher, as the exigency of the caſe may require.

§ 15. In a recovery with double voucher, the tenant or proprietor of the land, conveys an eſtate of freehold to ſome indifferent perſon, againſt whom the writ is brought; the tenant to the *præcipe* then vouches the proprietor of the land, who vouches over the common vouchee.

1 Inſt. 9 *b.*

§ 16. In every common recovery the demandant acquires the fee ſimple of the lands recovered although the word heirs be not mentioned in the judgment, becauſe the writ being brought for the abſolute property or fee ſimple of the lands, if judgment is obtained, it muſt be for as much as was demanded in the writ, and in all adverſary ſuits every recoveror recovered a fee ſimple.

TITLE XXXVI.

RECOVERY.

CHAP. II.

Of the Writ of Entry.

§ 1. *Things requiſite to a Recovery.* | § 2. *Writ of Entry.*

Section 1.

Things requiſite to a Recovery.

IT appears from the preceding chapter, that the following things are requiſite to the validity of a common recovery: Firſt, That a proper writ be ſued out. Secondly, That the perſon againſt whom the writ is brought, be actual tenant of the freehold. Thirdly, That ſuch tenant do vouch over ſome other perſon. Fourthly, That judgment be given for the demandant againſt the tenant, and for the tenant againſt the vouchee. And, Fifthly, That the recovery be executed by the ſheriff of the county in which the lands lie. We ſhall now proceed to explain more particularly thoſe different circumſtances.

Writ of Entry. 3 Rep. 3 *a.*

§ 2. A common recovery being a judgment in a real action, it cannot, of courſe, be regularly commenced, without a proper original writ; however, if a recovery is ſuffered without an original writ, it is not abſolutely void, but only voidable.

§ 3. A common recovery may be ſuffered on any writ, by which lands are demandable; but the writ which is now uſually ſued out for that purpoſe, is a writ of entry *ſur diſſeiſin* in the nature of an aſſize, which is properly grounded on a diſſeiſin done to the demandant himſelf; it may be brought in the *per*, the *per* and the *cui*, or the *poſt*; and, in common recoveries, it is always brought in the *poſt*. And the reaſon why this writ was choſen for the purpoſe of ſuffering common recoveries, was, becauſe the tenant may, in this ſpecies of action, vouch at large, and is not bound to vouch within the degrees of the *per*, the *per* and the *cui*, or the *poſt*; ſo that it is the ſafeſt action for purchaſers, who need not fear writs of error for wrong or illegal vouchers. In this writ, the demandant alleges, that the tenant had no legal title to the land, but came into poſſeſſion of it after one *A. B.* had turned out the demandant.

Booth Real Actions 176. 2 Inſt. 154.

§ 4. When a recovery became a common aſſurance, the king, by that means, frequently loſt his fines for alienation; but, by the ſtatute 32 *Hen.* 8. c. 1. ſ. 15. it was enacted, that fines for alienation ſhould be paid upon obtaining writs of entry in the *poſt* for ſuffering common recoveries.

§ 5. The writ on which a recovery is ſuffered ought to be ſimilar in every reſpect to a writ which is ſued out for the purpoſe of commencing an adverſary ſuit. The courts, however, make a diſtinction between a *breve adverſarium* and a *breve amicabile*, and will conſtrue

2 Rol. Rep. 67.

ſtrue the latter in a much more favourable manner than the former.

§ 6. Thus, where a writ of error was brought to reverſe a common recovery, which had been ſuffered on a writ of entry in the *poſt* of a manor, and of a yearly rent or penſion of four marks, and alſo of an advowſon, one of the errors aſſigned was, that a writ of entry in the *poſt*, does not lie of an advowſon. But it was unanimouſly determined, that the judgment ſhould be affirmed, becauſe a common recovery was not to be compared to a judgment in an adverſary ſuit, as it is by uſage and cuſtom become a common aſſurance and conveyance of lands, and is had by the mutual conſent of the parties, *et conſenſus tollit errorem.* Beſides, if it were otherwiſe, no recovery could be ſuffered of an advowſon or common in groſs, or of many other things, which would be highly inconvenient.

Dormer's Caſe, 5 Rep. 40 Poph. 22.

§ 7. So, where a writ of entry bore date 1 *Mar.* 7 *Eliz.* and the return was made *die Lunæ quarta Septimana quadrageſimæ proxim. futur.* the ſaid firſt day of *March*, being the firſt week of *Lent*, 7 *Eliz.* and upon this it was inferred, that the tenant was not to appear until *Monday* in the fourth week of *Lent*, 8 *Eliz.* which was a long time after the voucher appeared and vouched over. But it was determined by the whole court, that the original writ ſhould be taken as it was written, to be returnable on *Monday* in the fourth week of the ſame *Lent*, 7 *Eliz.* for it ſhall be taken (as it is written ſhortly) in ſuch a manner as to make the recovery good.

Barton's Caſe, Poph. 150. Cro. Eliz. 388.

Anon. Lit. Rep. 299.

§ 8. A common recovery was ſuffered, but no writ of entry was filed; in conſequence of which, a writ of error was brought: it was moved that it might be examined, whether any writ of entry had been filed or not: but the court denied it, though, if it appeared upon record that a writ had been filed, then they would conſider, whether a new writ ſhould be filed or not; and it was ſaid, that if a recovery was exemplified purſuant to the ſtatute 23 *Eliz.* though ſome part of it was loſt, yet it would be aided.

§ 9. By a rule of the Court of Common Pleas, made *Trin.* 30 *Geo.* 3. "It is ordered, that, from and "after the firſt day of *Mich.* term, then next enſuing, "in every common recovery wherein the vouchee or "vouchers ſhall perſonally appear at the bar of that "court for the purpoſe of ſuffering ſuch recovery, "the writ of entry ſhall be ſued out, and produced at "the time of the recording of the vouchee's or vouch-"er's appearance at bar, at the foot of the *præcipe* in "ſuch recovery."

H. Black. R. vol. i. 526.

TITLE XXXVI.

RECOVERY.

CHAP. III.

Of the Tenant to the Præcipe.

§ 1. *Reaſons why the Tenant to the Præcipe ſhould have the Freehold.*
17. *Where there are Leaſes for Lives, they need not be ſurrendered.*
19. *But Perſons having a prior Eſtate for Life muſt join.*
21. *A Surrender by the Tenant for Life is ſometimes preſumed.*
29. *Different Conveyances by which a Tenant to the Præcipe may be made.*
§ 30. *Fine.*
35. *Although no Uſe be declared.*
37. *Huſband ſeiſed jure ux. may make a Tenant to the Præcipe without his Wife's joining in a Fine.*
40. *Feoffment.*
42. *Bargain and Sale inrolled.*
45. *Leaſe and Releaſe.*
46. *A Recovery ſometimes good without a Tenant to the Præcipe.*
47. *Statute* 14 *Geo.* 2.

Section 1.

A COMMON recovery being a real action carried on through all its forms, it is abſolutely neceſſary, that the perſon againſt whom the writ of entry is brought, ſhould have an eſtate of freehold, by right or by wrong, in the lands to be recovered, either at the time when the writ is purchaſed, or at leaſt before judgment is given; becauſe, if he has not the freehold, it will not be in his power to reſtore the lands as the writ directs. And, in common recoveries, there is an additional reaſon; becauſe, as the demandant can recover nothing againſt the tenant, unleſs the tenant has the

Reaſons why the Tenant to the Præcipe ſhould have the Freehold. Pigot 28. Booth 3.

freehold, ſo the tenant can have no recompence in value againſt the vouchee, in conſideration of what he has loſt; for, until the demandant ſues out execution againſt the tenant, the tenant cannot have execution againſt the vouchee; and if the tenant has nothing in the land, no execution can be ſued againſt him, nor can any recovery in value be had over; conſequently, there will be no recompence to bind him, and the recovery will be no bar.

§ 2. If the tenant to the *præcipe* acquires the freehold at any time before judgment is given, it will be ſufficient.

Lacey v. William. Cep. Temp Holt. 614. 2 Salk. 568. 1 Ld. Raym. 227 475. Carth. 472.

§ 3. Thus, in ejectment, it appeared by a ſpecial verdict, that the tenant to the *præcipe* had not acquired the freehold until after the *teſte* of the writ of *ſummoneas ad warrantizandum*; ſo that he was not ſeiſed of the freehold at the return of the writ of entry. The Court of Common Pleas determined, that the recovery was valid. A writ of error was brought in the Court of King's Bench, and it was contended on the part of the plaintiff in error, that the recovery was void, becauſe, although a common recovery was a common aſſurance, yet it had forms peculiar to itſelf which ought to be obſerved. In ſuppoſition of law, the tenant ought to have the lands at the time of ſuing out the writ, otherwiſe he cannot render them as the writ ſuppoſes. The court ſuppoſes the tenant to be ſeiſed of the lands, otherwiſe, to what purpoſe are the lands demanded from him? The voucher ſuppoſes that the tenant has ſeiſin of the lands, for it would be abſurd that the tenant ſhould

ſhould vouch another perſon to warrant lands to him which he has not. On the other ſide, it was argued, that in all caſes of adverſary actions, although the perſon againſt whom the writ was brought was not tenant at the time of the *teſte*, but became tenant before the return, it was ſufficient. If the tenant to the *præcipe* was not ſeiſed at the return of the writ, he might avoid it by pleading non-tenure; if inſtead of that he vouched over, then he admitted the writ to be good as to himſelf, but ſtill the vouchee might counterplead the tenancy; if he did not, the recovery would be good by eſtoppel againſt the parties to it; however, in ſuch a caſe, the tenant to the *præcipe* could not recover over in value, becauſe he had loſt nothing; but if the tenant acquired the lands after the voucher, and judgment was given againſt him, it would bind the land; and as the tenant had loſt the land, he would recover in value againſt the vouchee: ſo that the recovery would be effectual. This being the law in adverſary ſuits, it ought certainly to be ſo in common recoveries, which the judges take notice of as common aſſurances, and which they will always ſupport, if poſſible.

It was adjudged that this recovery was good; and Lord Chief Juſtice *Holt* ſaid, the general rule was, that if the tenant to the *præcipe* acquired the freehold at any time before the judgment was given, it was ſufficient, becauſe it cannot then be ſaid, that the recovery was had againſt a perſon who had nothing in the lands; and it was not enough in a counterplea of voucher to ſay, the voucher had nothing in the lands at the time of the voucher, without

without adding *nec unquam poſtea;* therefore a writ might be made good by a ſubſequent purchaſe, ſo might a voucher; which was the more reaſonable, becauſe the demandant might have a good cauſe of action, although the tenant had not the land when he commenced his ſuit; ſo that it was ſufficient, in law, if the tenant had the land to render at any time before judgment.

Sambourn v. Belke, 1 Show. 347. S. P.

The ſtatute 14 *Geo.* 2. which will be ſtated at the end of this chapter, has obviated all objections of this kind againſt the tenant to the *præcipe*.

§ 4. If the tenant to the *præcipe* has the freehold at the time when judgment is given, although his eſtate be afterwards defeated, yet the recovery will be good.

§ 5. Thus, where land was given to an alien in tail, remainder over to another in fee; the alien ſuffered a common recovery, and died without iſſue. All this was found by office, and it was contended, that the alien was not tenant to the land when the recovery was ſuffered; but the court held the contrary, that the recovery was good.

Anon. 4 Leon. 84. Goldſb. 82.

§ 6. It has ſometimes been doubted in practice, whether upon the death of a perſon whoſe widow is entitled to dower, the heir can ſuffer a recovery before aſſignment of dower. No caſe of this kind has ever, I believe, been determined; but it follows, from the principles laid down by Chief Baron *Gilbert*, that ſuch a recovery would be good, for he ſays the law caſts the

Gilb. Ten. 26.

the freehold on the heir, immediately upon the death of the anceſtor; but the law does not caſt dower on the wife, ſhe takes it by her own act. It is true, that when the widow is endowed, the poſſeſſion that the law caſts on the heir is avoided, and the widow is conſidered as being in, from the death of her huſband; but ſtill the heir had the freehold until dower was aſſigned, which is ſufficient to ſupport the recovery. Tit. 6. c. 4. ſ. 2. Vide Lit. ſ. 393.

§ 7. Although a perſon has acquired the freehold by diſſeiſin, yet he will be a good tenant to the *præcipe;* and in all caſes where the validity of a common recovery is conteſted, the court will ſuppoſe that there is a good tenant to the *præcipe*, if nothing appears to the contrary. Lincoln College Caſe, 3 Rep. 58. Griffin v. Stanhope, Cro. Ja. 544.

§ 8. If a writ of entry is brought againſt the tenant of the freehold and a ſtranger, the recovery will be valid, for the recompence in value will go to the perſon who has really loſt the eſtate. 1 Vent. 358. Paulin v. Hardy. Skin. 3. 63. Shep. Tou. 41.

§ 9. If there be two joint-tenants of a manor, and a writ of entry of the whole manor is brought againſt one of them, on which a common recovery is ſuffered, it will only be good for the moiety of the perſon againſt whom the writ was brought; but as to the other moiety, it will be void for want of a tenant to the *præcipe.* Marquis of Wincheſter's Caſe, 3 Rep. 1.

§ 10. As it is abſolutely neceſſary that the tenant to the *præcipe* ſhould have an eſtate of freehold, it follows,

lows, that no perſon who has not an eſtate of freehold, can of himſelf ſuffer a common recovery, becauſe he cannot convey a freehold to the perſon againſt whom the writ is to be brought.

Keb. 735. 785.

§ 11. Thus, where a leſſee, *pour auter vie*, made a leaſe for 60 years, and died, in the lifetime of the *ceſtui que vie*, the perſon in reverſion, being tenant in tail, ſuffered a common recovery, which was held erroneous for want of a good tenant to the *præcipe;* for, upon the death of the tenant, *pour auter vie*, the freehold was caſt on the tenant for years; ſo that he, or ſome perſon claiming under him, ought to have been tenant to the *præcipe*.

Dormer v. Parkhurſt, 3 Atk. 135. 6 Brown Parl. Ca. 351.

§ 12. So where lands were limited to Sir *Robert Dormer* for 99 years, if he ſhould ſo long live, remainder to truſtees and their heirs, to preſerve contingent remainders, remainder to his firſt and other ſons in tail male. Sir *Robert* having iſſue a ſon, *Fleetwood Dormer*, they both joined in levying a fine to make a tenant to the *præcipe*, and then ſuffered a common recovery. The principal queſtion in this caſe was, whether the freehold paſſed to the truſtees, there being a conſiderable error in the words by which the remainder was limited to them? And the court having determined, that the freehold did paſs to the truſtees, they concluded that the recovery was void; for if it was conſidered as the recovery of *Robert Dormer*, it was void, becauſe he being only tenant for years, could not give a freehold to another, without which, there could not be a good tenant to the *præcipe;* for, to

make him ſo, he muſt have a freehold in him. And, taking it as the recovery of *Fleetwood* the ſon, it could not be good, the freehold being in the truſtees, and not in him, he having only a remainder expectant on the determination of their eſtate. And as to the fine levied by *Robert Dormer* and *Fleetwood*, it ſtood thus: conſidered as the fine of *Robert*, it was void for want of a freehold, it being ſettled beyond all doubt, that a fine by tenant for years operates nothing, and was abſolutely void; and, conſidered as the fine of *Fleetwood*, it was equally ſo for want of a freehold in him, it being equally clear, that none can levy a fine but he who has a freehold in poſſeſſion.

§ 13. It has been long ſettled, that a deviſe to executors for payment of debts, and, until debts are paid, only gives the executor a chattel intereſt in lands thus deviſed, and, therefore, does not prevent the diſpoſal or deſcent of the freehold; ſo that, if after ſuch a deviſe, the teſtator gives the ſame lands to a perſon for life, the freehold will veſt in ſuch deviſee immediately on the death of the teſtator, and he will be enabled to make a good tenant to the *præcipe*.

1 Inſt. 42 *a*. 8 Rep. 96 *a*.

§ 14. So, if a teſtator gives his executors full power to receive the meſne profits of his eſtates in a particular place, upon truſt to pay his debts, and afterwards deviſes thoſe eſtates to a perſon for life, the freehold will become veſted in ſuch deviſee on the death of the deviſor, and he may make a good tenant to the *præcipe*.

§ 15. Thus,

Carter v. Barnardiſton, 1 P. Wms. 505. 3 Brown Parl. Ca. 64.

§ 15. Thus, where Sir *Michael Armyne* being ſeiſed in fee of ſeveral eſtates in the counties of *Huntingdon*, *Lincoln*, *&c.* made his will, and thereby deſired, that his executors would take care to ſee all his debts and legacies paid by making ſale of his perſonal eſtate; and as his debts were great, he deviſed to his executors all his manors and lands of *Cherry Orton* and *Botolph Bridge*, to be by them ſold for the moſt that could be got, and the monies ariſing from ſuch ſale diſpoſed of in the payment of his debts and legacies. And, leſt both his perſonal eſtate and the monies to ariſe from ſuch ſale ſhould not be ſufficient, the teſtator gave his executors full power to receive the meſne profits of his whole eſtate, lying in *Pickworth* and *Willoughby*, in the county of *Lincoln*. The teſtator then deviſed the ſaid manors of *Pickworth* and *Willoughby*, after ſuch time as his debts and legacies ſhould be paid by the rents and profits thereof, to *Evers Armyne* Eſq. for his life, without impeachment of waſte; and in caſe the ſaid *Evers Armyne* ſhould have any iſſue male, then to ſuch iſſue male and his heirs for ever; and after the deceaſe of the ſaid *Evers Armyne*, in caſe he left no iſſue male, then after ſuch time as his debts and legacies were fully paid, he deviſed the manor of *Pickworth* to *Thomas Style* in fee. *Evers Armyne*, the deviſee, having got into poſſeſſion of the ſaid manors of *Pickworth* and *Willoughby*, ſuffered a common recovery of them before the debts were paid, and declared the uſes thereof to himſelf in fee. This caſe having been heard in the Houſe of Lords, the Judges were directed to give their opinions, "whether the eſtate for life was veſted "in *Evers Armyne* at the time of the recovery, before "all

"all the debts were paid, ſo that he could make a "good tenant to the *præcipe?*" And the Lord Chief Juſtice of the Court of Common Pleas, in the name of all the Judges who had conſulted together, delivered their unanimous opinion, "That the eſtate for life "was veſted in *Evers Armyne* at the time of the "recovery."

§ 16. It is not only neceſſary for a perſon, who ſuffers a common recovery, to have an eſtate of freehold in the lands, but it is alſo neceſſary that it ſhould be an eſtate in poſſeſſion; for the perſon againſt whom the writ is brought muſt be actual tenant in poſſeſſion of the freehold at the time when judgment is given; ſo that it frequently happens, that perſons who are entitled to eſtates of inheritance in lands, are, notwithſtanding, diſabled from ſuffering common recoveries of them, in conſequence of their not having a freehold in poſſeſſion. This happens in two inſtances: 1ſt, Where the lands are let out on leaſes for lives: 2dly, When there is an eſtate for life prior to their eſtate of inheritance.

§ 17. Before the ſtatute of *quia emptores*, ſubinfeudations, whereon rents and ſervices were reſerved, did not prevent a writ of entry from lying againſt the freeholder of the ſeignory; when common leaſes to farmers for one or more life or lives reſerving rent came in uſe, they reſembled ſubinfeudations, and, therefore, ought not to have prevented the *præcipe* from being brought againſt the owner of the freehold under which the leaſes were granted; but it was, however, thought neceſſary, and became uſual, for the perſon who intended

Where there are Leaſes for Lives, they need not be ſurrendered. 1 Bur. 115.

to ſuffer a recovery, to get conditional ſurrenders from the tenants for lives, in order to become ſeiſed of a freehold in poſſeſſion, and be thereby enabled to make a good tenant to the *præcipe*.

§ 18. This practice being productive of ſeveral inconveniencies, the leſſees for life being ſometimes unwilling, and frequently unable, from want of age or underſtanding, to make ſuch ſurrenders, and it being in ſome inſtances doubtful in whom ſuch leaſes for lives were veſted, the ſtatute 14 *Geo.* 2. c. 20. reciting that ſeveral leaſes had been, and were likely to be made, of honours, caſtles, manors, lands, tenements, and hereditaments, for one or more life or lives, under particular rents thereby reſerved and to be reſerved, and that, procuring ſurrenders of ſuch freehold leaſes or the tenants thereof to join, frequently occaſioned great trouble, difficulty, and expence to tenants in tail, it is therefore enacted, ſ. 1. "That all common recoveries "ſuffered, or to be ſuffered, in his Majeſty's Court of "Common Pleas at *Weſtminſter*, or in any other court "of record in the principality of *Wales*, or in any of "the counties palatine, or in any other court having "juriſdiction of the ſame, of any honours, caſtles, "manors, lands, tenements, or hereditaments, with"out any ſurrender or ſurrenders of ſuch leaſe or "leaſes, or without the concurrence, or any convey"ance or aſſurance from ſuch leſſee or leſſees, in order "to make good tenants to the writs of entry, or other "writs whereupon ſuch recoveries have been, or ſhall "be had or ſuffered, ſhall be as valid and effectual in "law, to all intents and purpoſes whatſoever, as if "ſuch

" ſuch leſſee or leſſees, or any other perſon or perſons " claiming under him, her, or them, had conveyed, " or joined in conveying, or ſhall convey, or join in " conveying, a good eſtate of freehold to ſuch perſon " or perſons as has, or have been, or ſhall become te- " nant or tenants to ſuch writs of entry, or other writs, " whereupon ſuch common recoveries have been, or " ſhall be ſuffered."

But Perſons having a prior Eſtate for Life muſt join.

§ 19. Although this ſtatute has made the ſurrender of leaſes for lives unneceſſary, yet it does not extend to eſtates for life which are prior to the eſtate of which a recovery is intended to be ſuffered. Such eſtates muſt, therefore, ſtill be ſurrendered to the perſon againſt whom the writ of entry is brought, for this caſe is expreſsly excepted in the ſtatute 20 *Geo.* 2. c. 20. ſ. 2. by which it is provided, " That nothing in that " act contained ſhould extend, or be conſtrued to ex- " tend, to make any common recoveries valid and " effectual in law, unleſs the perſon or perſons entitled " to the firſt eſtate for life, or other greater eſtate (in " caſe there was no ſuch eſtate for life in being) in re- " verſion or remainder, next after the expiration of " ſuch leaſes, has or have, by ſome lawful act or " means, conveyed or aſſured, or joined in conveying " or aſſuring, or ſhall, by ſome lawful act or means, " convey or aſſure, or join in conveying or aſſuring an " eſtate for life, at the leaſt, to ſuch perſon or perſons " as has or have been, or ſhall become tenant or te- " nants to the writ of entry, or other writs whereupon " ſuch common recoveries have been or ſhall be " ſuffered."

Pigot 50.

§ 20. The prior eſtate for life ought to be ſurrendered to the perſon who has the remainder or reverſion before he makes a tenant to the *præcipe*; but if the ſurrender is made after the execution of the deed, by which the lands are conveyed to the perſon who is to be tenant to the *præcipe*, it muſt then be made to him, otherwiſe it will be void, becauſe the perſon who is to ſuffer the recovery has then no reverſion in him for the ſurrender to operate upon.

A Surrender by the Tenant for Life is ſometimes preſumed.

§ 21. Common recoveries having been long conſidered as common aſſurances of lands, and in the nature of conveyances by conſent, the judges have, in conſequence of particular circumſtances, ſometimes preſumed that the tenant for life had ſurrendered his eſtate, although a ſurrender was not actually proved; and therefore where the poſſeſſion has accompanied a recovery for a long time, the court will preſume a ſurrender by the tenant for life to make a tenant to the *præcipe*.

Green v. Froud, 3 Keb. 310. 1 Mod. 117. 1 Vent. 257.

§ 22. In an ejectment upon a trial at bar for lands held in ancient demeſne, a recovery in the court of ancient demeſne was produced, which had been ſuffered a long time before, and the poſſeſſion had gone accordingly. It appeared, that part of the land was leaſed for life, and the recovery was by the perſon in reverſion; ſo that there was no tenant to the *præcipe*. But the court ſaid, that as the poſſeſſion had gone with the recovery for ſo long a time, they would preſume a ſurrender; as in an appropriation of great antiquity,

antiquity, a licence has been preſumed, although none appeared.

§ 23. So where collateral evidence has been given of a ſurrender by a tenant for life, the recovery has been deemed good.

§ 24. Upon a trial at bar, the leſſor of the plaintiff claimed under an old intail in a family ſettlement, and part of the eſtate appeared to be in jointure to a widow at the time her ſon ſuffered a common recovery. The defendant who claimed title under the recovery not being able to ſhew a ſurrender of the mother's life eſtate, it was inſiſted that there was no tenant to the *præcipe*, as to that part; ſo that the remainder, which the leſſor of the plaintiff claimed, was not barred. To obviate this objection, it was inſiſted by the defendant, that after ſo long a time had elapſed, a ſurrender ſhould be preſumed according to the doctrine laid down in the caſe of *Green* v. *Froud*; and to fortify this preſumption, they offered to produce in evidence the debt book of Mr. *Edwards*, an attorney at *Briſtol*, then a long time dead, wherein he had charged 32 *l.* for ſuffering the recovery, two articles of which charges were, for drawing a ſurrender of the mother's eſtate 20 *s.* and for ingroſſing two parts thereof 20 *s.* and that it appeared by the book, that the bill had been paid. This being objected to as improper evidence, the court were of opinion that it ſhould be allowed; for it was a circumſtance material upon the enquiry into the unreaſonableneſs of preſuming a ſurrender of the widow's life eſtate, and could

Warren ex dem. Webb v. Grenville, 2 Stra. 1129.

not be ſuſpected of having been done for this purpoſe. If *Edwards* had been living, he might undoubtedly have been examined; and after his death this was the next beſt evidence, and it was accordingly read; after which the court declared, *that without this circumſtance they would have preſumed a ſurrender, and deſired it might be taken notice of, that they did not require any evidence to fortify the preſumption after ſuch a length of time.*

§ 25. But where there is no reaſon or ground to found a preſumption, that the tenant for life had ſurrendered his life eſtate, and where the poſſeſſion has *not* gone with the recovery, the court will not preſume that ſuch a ſurrender was made.

Goodtitle ex dem. Bridges v. the Duke of Chandos, 2 Burr. 1065.

§ 26. *G. R. Bridges* being tenant in tail of a conſiderable eſtate, whereof he was in poſſeſſion of ſome part, the remainder being held by a widow, on whom it had been ſettled for life, for her jointure, and who was then in poſſeſſion of it, ſuffered a common recovery of the whole eſtate tail, uſing ſuch deſcriptions as were ſufficient to include the whole eſtate tail, and then ſettled it on the Duke of *Chandos*. Upon the death of *G. R. Bridges*, the Duke of *Chandos* entered into poſſeſſion of all the eſtate, except the part of which the widow was in poſſeſſion, and upon her death, he took poſſeſſion of that part alſo. An ejectment was brought againſt the Duke of *Chandos* by *James Bridges* the reverſioner, for that part of the eſtate tail whereof the widow was in poſſeſſion, at the time

time when the recovery was ſuffered; upon the ground that there was no ſurrender of the widow's life eſtate: the Duke of *Chandos* being unable to give any ſort of evidence of an *actual ſurrender*, his counſel inſiſted at the trial that a ſurrender of the widow's life eſtate ought to be *preſumed* after ſo long a time, even though they ſhould not give any evidence whatſoever of ſuch a ſurrender; but Mr. Juſtice *Noel*, who tried the cauſe, was of opinion, that a ſurrender of the tenant for life could not be preſumed, when no ſort of evidence had been given to make ſuch a fact in the leaſt probable; and when the poſſeſſion had not gone with the recovery, but had continued in the tenant for life until the time of bringing the ejectment, and accordingly he directed the jury to find for the plaintiff. Upon this direction a motion was made for a new trial. The defendant's counſel relied on the caſes of *Green* v. *Froud*, and *Warren ex dem. Webb* v. *Grenville*, mentioned in the preceding pages. On the other ſide it was argued for the plaintiff, that there could be no preſumption without ſome facts to ground it upon. In the caſe of Mr. *Grenville*, there was a very ſtrong preſumption ariſing from the articles in the attorney's bill, the proof whereof the court allowed to be entered into, and received ſatisfaction from it; and that there was no caſe where a preſumption of a ſurrender had been raiſed, without poſſeſſion accompanying and following the recovery.

In the caſe of *Froud* v. *Green*, upon which Mr. *Grenville*'s caſe was ſaid to be grounded, there

was a poſſeſſion which had followed the recovery for a long time, and that was the very reaſon there given for the courts forming the preſumption which they then made. That the rule in all the caſes cited, and in all caſes of this kind, muſt in reaſon and common ſenſe, neceſſarily be underſtood to relate to the length of time which has elapſed *ſince the tenant in tail's coming into poſſeſſion*, and not to the length of time ſince the ſuffering of the recovery. The outſtanding life eſtate, during the life of the widow, forms the ſtrongeſt preſumption that ſhe did not ſurrender the eſtate; beſides, it did not at all appear from the Judge's report that *G. R. Bridges*, the tenant in tail in poſſeſſion of all the *reſt* of the eſtate, and of which he had power to ſuffer a recovery, ever meant or intended to ſuffer a recovery of theſe ſettled lands, which he had no power to do; he had other lands upon which the recovery operated, and there was no reaſon to imagine that he meant to include theſe lands, or that he ever attempted to procure a ſurrender of them. Lord *Manſfield*.—"I was counſel in the caſe "of Mr. *Grenville* reported by *Strange*, and I re- "member very well that the point of evidence was "ſtrongly litigated; the attorney, who had been "concerned in the tranſaction of the common reco- "very, was one *Edwards* of *Briſtol*, who had been "then long dead: the entry in his bill book was "made at the time of the tranſaction, and a receipt "had been given upon the bill which contained the "articles *for drawing and ingroſſing the ſurrender*;

"ſo

" ſo that there was poſitive proof in that caſe of an " actual ſurrender: and there the jointreſs had been " dead *a vaſt number of years*, and the perſon who " ſuffered the recovery, and his ſon after him, had " both of them, during their reſpective lives, ſuffi- " cient opportunity to have ſet it right after they " came into poſſeſſion, if they had known or ſuſ- " pected it to have been defective, which certainly " formed a preſumption that it was regular, and not " defective.—I am confident that all the court did, " or intended to do in that caſe, was only to take care " that it ſhould be underſtood, that they did not " mean to ſhake the authority of any one caſe which " had been founded upon preſumption, and that they " would not require poſitive proof of a ſurrender, in " any caſe, where there was ſufficient preſumption of " it. Sir *J. Strange*'s report is incorrect, conſidered as " a foundation for a principle or rule of property, " though it might be enough to ſerve the taker of " ſuch a note for a memorandum to refreſh his own " recollection; if that be ſo, then conſider the pre- " ſent caſe upon principles. There are two ſorts of " preſumption; one, a preſumption of law, and not " to be contradicted; the other a ſpecies of evidence, " which latter muſt have a ground to ſtand upon; " ſomething from whence it is to ariſe. It is now " fully ſettled and eſtabliſhed, that a tenant in tail " may, if he pleaſes, either turn his eſtate tail into a " fee ſimple, or alienate it for his own benefit, by " ſuffering a common recovery; but he muſt have a " ſufficient eſtate, and power to qualify him for ſuf-

" fering ſuch a recovery; he muſt either be tenant in " tail in poſſeſſion, or he muſt have the concurrence " of the freeholder, who claims under the ſame ſet- " tlement. This principle is adhered to by the ſtatute " 14 *Geo.* 2. c. 20. the tenant for life, whoſe conſent " is neceſſary to the tenant in tail in remainder, to " enable him to cut off the intail, is not the leſſee of " the land under a beneficial leaſe, but the original " tenant for life, claiming under the ſame family ſet- " tlement, and having a life eſtate ſettled upon him " prior, in order of ſucceſſion, to the other's re- " mainder in tail. Where a perſon has a power to " ſuffer a recovery, and thereby bar his eſtate tail, " *omnia præſumuntur rite & ſolemniter acta*, until " the contrary appears; and it is reaſonable that it " ſhould be ſo: but if the contrary appear, then there " is an end of ſuch preſumption. This was the caſe " of the Earl of *Suffolk*'s recovery, upon a trial at " bar in this court, in *Eaſter* term, 1747; there the " contrary *did* appear, and the preſumption was " thereby deſtroyed; there were blundering deeds " actually produced, which appeared clearly to be " wrong; and it was manifeſt, upon the evidence " diſcloſed, that there was not a good tenant to the " *præcipe:* it was therefore impoſſible for the court, " in that caſe, to preſume that there was a good " tenant to the *præcipe.*

Keen ex dem. Earl of Portſmouth v. Earl of Eſſingham, 2 Stra. 1267.

" But if a man has power to ſuffer a recovery, " that is a ſolid and reaſonable ground for pre- " ſuming that all was done rightly and regularly,

" unleſs

" unleſs ſomething to the contrary ſhall appear. " Where the freeholder is a truſtee for the tenant in " tail himſelf, and under his power and direction, it " is a reaſonable and juſt cauſe for preſuming, that " every thing was regularly tranſacted; ſo where the " perſon or perſons intereſted to object againſt the " validity of a recovery have had opportunity to make " objections to it, but inſtead of doing ſo, have ac- " quieſced under it, and not diſputed its validity, " this forms a preſumption that all was right and " regular. But there can be no preſumption in the " nature of evidence, in any caſe, without ſomething " from whence to make it, ſome ground to found the " preſumption upon; whereas here is abſolutely no- " thing from whence to preſume a ſurrender: the " ſingle pretence to any the leaſt ground of preſump- " tion, in the preſent caſe, can only be this, that no " tenant in tail in remainder would ſuffer a recovery, " without firſt getting a ſurrender of the life eſtate, " in order to make it valid and effectual. But even " that ground, ſlight as it is, will not hold in the " preſent caſe; for it does not at all appear, upon the " report of the Judge, that *G. R. Bridges*, who ſuf- " fered the recovery in queſtion, had the leaſt inten- " tion whatſoever to include thoſe particular lands in " the recovery which he ſuffered, and which he had " full power in himſelf alone to ſuffer, of all the reſt of " the eſtate whereof he was at that time tenant in tail " in poſſeſſion. He was then in poſſeſſion of the manor " of *Keynſham*, and of other lands in *Keynſham*, ſuf- " ficient to anſwer the general deſcriptions uſed in the

" recovery,

" recovery, he muſt probably know, or have been " informed by his counſel or agents, that he had no " ſuch power over the ſettled parts, without obtaining " a ſurrender of the life eſtate; he might perhaps be " ſatisfied that he could not obtain a ſurrender of the " life eſtate, or he might have attempted to obtain it, " and failed in ſuch attempt. If the mere fact of a " remainder-man in tail's ſuffering a recovery was " *alone* ſufficient to ground a preſumption of a ſur- " render of the life eſtate; it would be in the power " of every remainder-man in tail to bar the eſtate tail, " notwithſtanding the tenant for life ſhould abſolutely " refuſe to join with him in ſuffering a recovery; it is " therefore neceſſary that there ſhould be facts and " circumſtances to ground a preſumption of ſuch a " ſurrender upon: whereas in the preſent caſe it is ſo " far from being reaſonable to preſume that there was " ſuch a ſurrender from the jointreſs, that there are, " on the contrary, many reaſons to induce a ſuſpicion " that there was not ſuch a ſurrender; ſhe might " have more regard for *James Bridges* than for *George*; " ſhe might think it wrong or unkind to hurt the " reverſioner, or even whim and peeviſhneſs might " prevent her from interfering: there is no defining " the various reaſons ſhe might have to hinder her " from ſurrendering her life eſtate for ſuch purpoſe. " Mr. *George Bridges* being therefore only tenant in " tail in remainder, and the life eſtate under the ſame " ſettlement, ſtill ſubſiſting at the time of his ſuffering " the recovery, it is clear that he had no power to " alien or to bar. And there is nothing from whence

" to

" to presume a surrender of the life estate to enable " him to do so.

" If he had any power to bar or alien, then indeed " no presumption could have been too large, in order " to prevent slips in legal forms and methods of con- " veyance, and to effectuate the intention of a person " who had a legal right to do such an act. No argu- " ment can be drawn in the present case from length " of time, because the ejectment was brought imme- " diately upon the death of the jointress." The court were all clear and unanimous, that there was no colour for objecting to the Judge's direction.

At the sitting of the court the next morning, Lord *Mansfield* mentioned this case again: he said he had looked into his own notes of the case of *Warren*, on the demise of *Webb* against *Grenville*, where the recovery was of forty years standing: and the court did lay it down in that case, " that, after a recovery of " forty years standing, they would, without any other " circumstances, presume a conditional surrender to " have been made by the tenant for life;" and they relied upon 1 *Ventr.* 257, and Mr. *Pigot*'s book, p. 41. But his lordship observed, that there are other circumstances, in the case in *Ventris*; and there is nothing in *Pigot*, to justify this general position. And he added, that in the case then at the bar, the court did (as he had taken it down) admit as evidence the entry in the attorney's book, as has been mentioned. He said, he was rather more strongly of opinion than he was yesterday, " that in the present case, there

" was

" was no ground for a preſumption that there was " any ſurrender by the tenant for life." Here were two particular reaſons againſt making any ſuch preſumption. One was, that there did not appear to have been any intention in the remainder-man in tail, to ſuffer a recovery of theſe particular lands: the other, that here was no poſſeſſion at all, under this recovery; but, on the contrary, the ejectment was brought, and the validity of the recovery put into litigation, immediately after the death of the tenant for life. If the eldeſt ſon, who has a remainder in tail under a family ſettlement, ſhould privately ſuffer a common recovery, and his father live many years afterwards, it might as well be argued, " that length " of time from the date of the recovery ſhould induce " a preſumption, that the father ſurrendered his eſtate " for life." And his lordſhip declared himſelf as clear, that if there had been a long poſſeſſion by the tenant in tail after the death of the tenant for life, though ſuch a poſſeſſion might be aſcribed to the entail, the preſumption ought to have been made, upon the ground of acquieſcence under it, and the probability ariſing therefrom, " that the parties knew that " the recovery was not defective." Rules of property ought (his lordſhip ſaid) to be generally known, and not to be left to looſe notes, which rather ſerve to confound principles, than to confirm them. He therefore propoſed to have a conference with all the judges upon this caſe: which propoſal did not ariſe, he ſaid, from any doubt about the matter; (for he was more confirmed in his opinion, than he was yeſterday

terday;) but for the ſake of having ſo conſiderable a rule of property ſettled, and of rendering it notorious and publick. For which purpoſe, he (at firſt) ordered it to ſtand over till next term: but afterwards, upon its being agreed by all the parties, that, in Mr. *Grenville*'s caſe, there was a great number of years during which the tenant in tail had been in poſſeſſion after the death of the tenant for life; and upon the now defendant's counſel candidly declaring "that they themſelves were fully ſatisfied with the preſent opinion of the court," he retracted his propoſal, and ſaid he would not trouble the Judges with it, ſince the counſel were ſo candid as to acquieſce entirely in the opinion that the court had already intimated. His lordſhip further added, that he would have it underſtood, that poſſeſſion of the tenant in tail, after the death of the tenant for life, does leave a ground of preſumption, "that there was a ſurrender." But in the preſent caſe, there was no poſſeſſion after the death of the tenant for life: the ejectment was brought immediately.

§ 27. Where, after a recovery the deeds were ſuppreſſed by the tenant for life, ſo that it could not be made out whether he had ſurrendered his eſtate for life to the tenant to the *præcipe* or not, it was decreed for the recovery, without allowing a trial at law; for where deeds are ſuppreſſed *omnia præſumuntur.* Gartſide v. Radcliffe, 1 Chn. Ca. 292.

§ 28. Where a perſon has only a truſt eſtate of freehold, he may notwithſtanding make an equitable

tenant

tenant to the *præcipe*, which will enable him to ſuffer what is called an equitable recovery, of which the effect will be ſtated hereafter.

Different Conveyances by which a Tenant to the Præcipe may be made.

§ 29. When the perſon who means to ſuffer a common recovery is in actual poſſeſſion of the freehold, he may convey that freehold to any ſtranger, for the purpoſe of making him tenant to the *præcipe* by fine, by feoffment, by bargain and ſale inrolled, or leaſe and releaſe.

Fine.

§ 30. It is ſometimes thought expedient to make a tenant to the *præcipe* by fine, not only on account of the notoriety of this ſpecies of aſſurance, but becauſe even an erroneous fine gives ſuch an eſtate to the cognizee, as is ſufficient to make him a good tenant to the *præcipe*. And Sir *M. Hale* has ſaid that the cognizee of a fine *oct. purif.* would be a good tenant to the *præcipe* in a recovery ſuffered the ſame day, and the court would preſume a priority to ſupport a conveyance.

3 Keb. 597.

Lloyd v. Evelyn, 2 Salk. 568.

§ 31. Thus, where a writ of error was brought againſt a perſon who was made cognizee of a fine, in order to become tenant to the *præcipe*, and after the recovery had been ſuffered, the fine was reverſed for error; yet the recovery was held good, becauſe there was a good tenant to the *præcipe* at the time.

§ 32. But if the fine was in itſelf abſolutely void, as if the perſon who levied it had no eſtate of freehold in

in the land, then the recovery would be void, becauſe in that caſe the fine paſſed no eſtate. Thus in the caſe of *Dormer* v. *Parkhurſt*, which has been already ſtated, a fine was levied by a tenant for years, and a remainder-man in tail to make a tenant to the *præcipe*, and it was determined that the recovery was void; becauſe none of the parties to the fine had an eſtate of freehold in the lands.

§ 33. If a fine be levied to a leſſee for years of the ſame land for the purpoſe of making him tenant to the *præcipe* in a common recovery, the term for years will not be merged by the fine: for in the third ſection of the ſtatute of uſes, 27 *Hen.* 8. there is a ſaving to all perſons and their heirs, who ſhall be ſeiſed to any uſe, of all ſuch former right, title, *&c.* as they had to their own uſe, in any manors, lands, *&c.* whereof they ſhall be ſeiſed to any other uſe.

1 Vent. 195. 1 Mod. 107.

Ferrers v. Termor, Tit. 11. ch. 3. f. 42.

§ 35. It is a well known principle of law, that where a fine is levied without any conſideration or declaration of uſe, the uſe and legal eſtate immediately reſult to the cognizor of the fine; ſo that the cognizee has only a ſeiſin of an inſtant; in conſequence of this doctrine, where a fine was levied, in order to make a tenant to the *præcipe*, and a writ of entry was brought againſt the cognizee of the fine, on which a common recovery was ſuffered, it was doubted whether ſuch a recovery was good; for as no uſe was declared on the fine, it was ſaid that the uſe and eſtate immediately reſulted back to the cognizor, ſo that the

Although no Uſe be declared.

3 Keb. 113.

Pigot 52.

cognizee had no eſtate of freehold when the writ of entry was brought, nor ever afterwards. Mr. *Pigot* held, however, that ſuch a recovery would be good; for, at common law, if a fine was levied without conſideration, as in a fine there needs none, the cognizee was tenant to all writs, until the ſtatute of pernors of profits, and the ſtatute of uſes. And although, ſince the ſtatute of uſes, the uſe reſults back when no uſe is declared, yet the intent of the parties always guided the uſe, and there could be no reſulting uſe againſt the expreſs intention of the parties; ſo that whenever the uſe reſults, it is becauſe the parties intend it.—Now, in a caſe of this kind, the evident intention of the parties is to make a tenant to the *præcipe*, which appears upon the record, by the writ of entry being brought againſt the cognizee; and therefore he muſt have ſuch an eſtate as will make him a good tenant to the *præcipe*. Theſe principles are fully eſtabliſhed in the following caſe:

Pigot, 54, 55.

Lord Altham v. Lord Angleſey, Gilb. Rep. 16. Salk. 676. Caſes temp. Holt. 733. 11 Mod. 210.

§ 36. Tenant in tail, remainder in tail, with remainder over, the tenant in tail levied a fine *ſur cognizance de droit come ceo, &c.* to *J. S.* and his heirs, in order to make him tenant to the *præcipe*, but no uſe was declared on the fine. Seven years afterwards a writ of entry was brought againſt *J. S.* who vouched the cognizor of the fine, and a common recovery was thus regularly ſuffered. The queſtion was, whether *J. S.* had an eſtate of freehold in him when the recovery was ſuffered? It was contended, that although the legal eſtate paſſed by the fine to *J. S.* yet as no

uſe was declared on the fine, the uſe reſulted back to the cognizor; ſo that *J. S.* had no eſtate in the lands at the time when the recovery was ſuffered, and therefore was not a good tenant to the *præcipe*. But it was held by Lord Chief Juſtice *Holt*, and all the other Judges, that when a fine was levied, or a feoffment made, to a man and his heirs, the eſtate was in the cognizee or feoffee, not as an uſe, but by the common law, and might be averred to be ſo; and as in this caſe the intention of the fine plainly appeared to be for the purpoſe of making a tenant to the *præcipe*, the uſe and eſtate ſhould be allowed to have veſted in *J. S.* ſo that the recovery was well ſuffered; and this point was again determined by the Court of King's Bench in *Mich.* 3 *Geo.* 1. 1 Stra. 17.

§ 37. It has been often doubted, whether a huſband ſeiſed *jure uxoris* could make a tenant to the *præcipe* of his wife's land, for the purpoſe of ſuffering a common recovery, without his wife's joining him in a fine. This doubt, probably, aroſe from the words of Lord *Talbot*, in the caſe of *Robinſon* v. *Cummins*, as reported in caſes *tempore Talbot* 167, for there his Lordſhip is made to ſay, "it hath been ſaid that a feme, tenant in "tail, and her huſband, cannot make a tenant to the "*præcipe* without a fine; but whatever may be the "caſe, where a huſband is merely ſeiſed in right of "his wife, is not neceſſary for me to determine, be"cauſe, in this caſe, Sir *J. Robinſon* did by his inter"marriage, become entitled to an eſtate by the curteſy, and,

Huſband ſeiſed jure uxoris, may make a Tenant to the Præcipe without his Wife's joining in a Fine.

" and, therefore, he alone, without his wife's joining, " might have made a good tenant to the *præcipe*."

In an opinion given by the late Mr. *Booth* on this ſubject, he obſerves, that this report of Lord *Talbot*'s argument is incorrect; that he himſelf was preſent at the hearing of that caſe, and had a very full note of it; and that Lord *Talbot*'s words were theſe:—

Caſes and Opinions, vol 1. 436. vol. 2. 132.

" If I ſhould lay it down as a rule, that, where " the wife is entitled to an eſtate tail in poſſeſſion, her " huſband and ſhe could not make a tenant to the " *præcipe*, for the docking of the intail without a fine, " becauſe the law is ſuppoſed to appoint no other me- " thod, by which a woman under coverture can con- " vey her freehold, but by fine, I ſhould ſhake many " of the common recoveries of the kingdom; for, " whatever may have been the practice of ſome over- " cautious conveyancers, yet I believe it hath often " been held, that the huſband alone may, by deed " only, and without any fine levied by the wife, con- " vey a ſufficient freehold to the grantee, to make him " tenant to the *præcipe* *."

This latter opinion ſeems to be perfectly conſiſtent with the principles of the common law; for Lord *Coke* ſays, " if a man taketh to wife a woman who is ſeiſed

1 Inſt. 351 *a.* Idem 273 *b.*

* Mr. *Booth*'s account of what Lord *Talbot* ſaid on this occaſion, is confirmed by a manuſcript report of the caſe of *Robinſon* and *Cummins*, in the poſſeſſion of Mr. *Butler*, of which he has made mention in a note on the *Firſt Inſtitute*, 326 *b*.

" in

" in fee, he gaineth by the intermarriage an eſtate of " freehold in her right, which eſtate is ſufficient to work " a remitter."

§ 38. It muſt be the ſame where a man marries a woman ſeiſed in tail, for a feme-covert cannot have a ſeiſin diſtinct from her huſband; and, on this ground, it has frequently been determined, that the huſband's conveyance is ſufficient to transfer a good eſtate of freehold during the joint lives of the huſband and wife. Mr. *Pigot* was of the ſame opinion, having laid it down, that a huſband, ſeiſed jointly with his wife, whether by moieties or entireties, or ſeiſed only in right of his wife, might create an eſtate of freehold during the coverture, and thereby make a good tenant to the *præcipe;* and there is a caſe in *Roll's Abridgement*, in which this point was expreſsly determined.

Gilb. Ten. 108. 1 Roll. Ab. 845.

Pig. 72.

§ 39. A huſband ſeiſed in right of his wife for life, remainder in tail to *B.*, remainder to *C.*, bargained and ſold the land to another, againſt whom a *præcipe* was brought, who vouched him in remainder, and ſo a common recovery was ſuffered. Adjudged, that the recovery barred the remainder, becauſe the bargainee was a good tenant to the *præcipe*.

Roll's Ab. Tit. Recovery, (A.) pl. 4.

§ 40. It has been a frequent practice ever ſince the introduction of common recoveries, to make a feoffment with livery of ſeiſin of the lands, to the perſon againſt whom the writ of entry was intended to be brought, it being a common opinion, that a feoffment

Feoffment.

was the moſt ſecure conveyance by which a tenant to the *præcipe* could be made; becauſe, if the feoffor was in poſſeſſion at the time when livery of ſeiſin was made, the feoffment was ſuppoſed to paſs a good eſtate of freehold, either by right or by wrong; that is, by diſſeiſin; but this doctrine has been denied in the following caſe:

Taylor ex dem. Atkyns v. Horde, 1 Burr. 60. 6 Brown Parl. Ca. 633.

§ 41. In an ejectment for lands in *Glouceſterſhire*, the jury found a ſpecial verdict, that Sir *Robert Atkyns* ſenior, being tenant for life, with remainder to his firſt and other ſons, reverſion in fee to himſelf, with a power of appointing a jointure to any after-taken wife, married *Ann Dacres*, and, purſuant to his power, limited the lands in queſtion to the ſaid *Ann Dacres* for her life as a jointure. Sir *Robert Atkyns* ſenior, made his will duly atteſted, and deviſed his reverſion in fee, expectant on the eſtate tail, limited to his firſt and other ſons, to Mr. *Atkyns* the leſſor of the plaintiff. Sir *Robert Atkyns* ſenior died, leaving a ſon, Sir *Robert Atkyns* junior, who entered on all the eſtate, except that part which was limited to Lady *Atkyns* for her jointure, on which ſhe entered. Lady *Atkyns* being in poſſeſſion of theſe lands, an ejectment was brought againſt her in the Common Pleas by *John Philips*, on the ſeveral demiſes of Sir *Robert Atkyns* junior, and *Joſeph Walker*, for the recovery of the premiſes in queſtion, on the ground, that Sir *Robert Atkyns* ſenior had no power of appointing her a jointure; and the ſame was tried at the bar of the Court of Common Pleas, when a verdict was found for the plaintiff, on which

which judgment was entered, and a writ of *habere facias poſſeſſionem* was ſued out and executed; and Sir *Robert Atkyns* junior entered into, and was in poſſeſſion of the premiſes. Sir *Robert Atkyns* junior being thus in poſſeſſion during the lifetime of Lady *Atkyns*, made a feoffment of the premiſes, with livery of ſeiſin to *James Earle*, in order to make him tenant to the *præcipe*, for the purpoſe of ſuffering a common recovery, which it was thereby declared, ſhould enure to the uſe of Sir *Robert Atkyns* junior, his heirs and aſſigns for ever. A common recovery was accordingly ſuffered, in which the writ of entry was brought againſt *James Earle*, the feoffee, who vouched Sir *Robert Atkyns* junior and his wife, and they vouched over the common vouchee. Sir *Robert Atkyns* junior continued in poſſeſſion, from the time of the recovery until *November* 1711, when he died without iſſue. Lady *Atkyns*, the jointreſs, brought an ejectment againſt *Robert Atkyns* the heir at law of Sir *Robert Atkyns* junior, for the recovery of her jointure; the cauſe having been tried at the bar of the Court of Common Pleas, and it appearing evidently to the court, that Sir *Robert Atkyns* ſenior had a power of appointing a jointure to Lady *Atkyns*, which he had duly executed, and that the former verdict was clearly wrong, a general verdict was given for the plaintiff, on which judgment was entered, and Lady *Atkyns* was reſtored to the poſſeſſion of the premiſes, and continued ſeiſed of them until the time of her death. The principal queſtion in this caſe was, whether the recovery was well ſuffered? which entirely depended upon, whether *James*

Earle the feoffee of Sir *Robert Atkyns*, was a good tenant to the *præcipe*.

It was contended, on the part of the plaintiff, that the recovery was not well ſuffered; and, to ſhew that *James Earle* took no eſtate by the feoffment, which could make him a ſufficient tenant to the freehold, to anſwer the writ in a common recovery, it would be material to conſider, firſt, whether Sir *Robert Atkyns* junior was tenant in tail in poſſeſſion; and, ſecondly, ſuppoſing him to be only tenant in tail in remainder, whether his feoffment conveyed the freehold to *James Earle* by diſſeiſin? As to the firſt of theſe queſtions, if Sir *Robert Atkyns* had been tenant in tail in poſſeſſion, his bargain and ſale, his leaſe and releaſe, his fine, or his feoffment, would have conveyed a baſe fee; and operating by way of diſcontinuance, voidable either by the entry or action of the iſſue in tail, or remainder-man, would have made, by diſcontinuance, a ſufficient tenant of the freehold; but Lady *Atkyns*, the jointreſs, was ſeiſed of the freehold for life, at the time of making the feoffment, and never joined in conveying an eſtate to the feoffee; the feoffment, therefore, being only the act of the tenant in tail in remainder, muſt either paſs an eſtate by diſſeiſin, or was abſolutely void. Then, whether the feoffment conveyed the freehold to *John Earle*, ſo as to make him a good tenant to the *præcipe* by diſſeiſin, depended, firſt, on his entry; ſecondly, on his feoffment. By his entry, he gained no freehold; by his feoffment, he conveyed no eſtate; for, as to his entry, it was made under a miſtaken

miſtaken judgment in ejectment, for Lady *Atkyns*, the jointreſs, recovered poſſeſſion again in ejectment; by which ſecond judgment, his title was diſaffirmed; and as the firſt judgment was plainly wrong, his entry muſt be conſidered as the mere act of tenant in tail in remainder. By the judgment in ejectment, he could recover nothing but the term; the point of that action is, that the plaintiff may gain poſſeſſion under his term. The poſſeſſion of the leſſee being that of the leſſor, the way in which it always operates to the leſſor's benefit, is, that by obtaining judgment for the poſſeſſion of his ſuppoſed tenant, he is enabled to enter; and, having entered, the poſſeſſion unites with any preſent freehold in himſelf, whether it be a particular eſtate, or an eſtate in fee according to his right. But, in this caſe, Sir *Robert Atkyns* had no preſent eſtate of freehold in himſelf, he gained only a bare poſſeſſion, and the freehold ſtill remained in judgment of law, in the jointreſs who had the right to it: the entry of Sir *Robert Atkyns* under the judgment, muſt be a lawful entry; whether the ſheriff executes the writ and gives poſſeſſion, or whether the party is his own officer, and executes it for himſelf by taking poſſeſſion: it has been held, that the entry is equally lawful in either method, if it purſues the judgment. But his poſſeſſion being recovered without title, no holding over could gain the freehold; and his entry being lawful, no holding over, though wrongful, could create a diſſeiſin, or change the cauſe of his poſſeſſion; ſo that his conveyances were abſolutely void, he having no eſtate on which a releaſe would operate by way

of enlargement, and there being no privity between him and the owner of the freehold. As to the feoffment of Sir *Robert Atkyns*, it might be conſidered in two lights. Firſt, as a conveyance, operating either by right or by wrong. Secondly, as a conveyance, executed with a particular intent of making a tenant to the *præcipe* in a common recovery. 1ſt, As a conveyance, generally, it was not pretended that it could operate by right; it could only then be conſtrued to convey a freehold by wrong. But it was a neceſſary conſequence of the reaſoning upon Sir *Robert Atkyn*'s entry, that his feoffment was abſolutely void; for, where the true owner of the freehold is actually expelled by the tortious entry of the diſſeiſor taking violent poſſeſſion of the land, that diſſeiſor has gained an eſtate of freehold and fee, which will paſs by a bare livery on his feoffment, his force gained him an eſtate by wrong, and his feoffment will convey it. But, in this caſe, the entry and the poſſeſſion being lawful ſo long as the judgment was in force, the only wrongful act from which a diſſeiſin could be inferred, was the feoffment. The giving livery upon that feoffment, not followed by any poſſeſſion of the feoffee, could never make a diſſeiſin in the ſtrict, original, and legal ſenſe; it would be a diſſeiſin merely at the election of the rightful owner of the freehold, and for the ſake of his remedy. It was the act of his tenant for years, and the wrongful feoffee was put into poſſeſſion; the true owner might either accept his rent, and treat him as an under-tenant and aſſignee of the term, or he might maintain an aſſize and recover the freehold. If the

wrongful

wrongful feoffor continued in poſſeſſion by colluſion with his feoffee, as in the preſent caſe, the true owner was under no neceſſity to take notice of the feoffment; he was not bound to conſider his own tenant as a diſſeiſor, and himſelf as out of poſſeſſion, but ſtill had it in his election, either to accept his rent, diſtrain and bring an action for it, or to proceed in a real action for recovery of the freehold, as in caſe of a forfeiture. Thus, the feoffment of tenant for years, or tenant by ſufferance, would make a diſſeiſin for the benefit of his leſſor, in reſpect of that remedy which the leſſor might elect to take; but eſtates in remainder could not be diſplaced without a tortious entry; and, as to ſuch remainders, the feoffment was abſolutely void in law. 2d, As a conveyance, executed with the particular intent to make a tenant to the *præcipe* in a common recovery, it had never yet been determined, that the feoffment of a tenant for years, being alſo tenant in tail in remainder, perfected by livery upon the land, under colour of lawful poſſeſſion *eo animo*, to make a tenant of the freehold in a common recovery, would be ſufficient to ſupport the judgment in that recovery, and enable him to bar his own and the ſubſequent eſtates; if ſo, then a tenant in tail in remainder might ſuffer a recovery in every inſtance, as freely as a tenant in tail in poſſeſſion, not only without the concurrence of the immediate owner of the freehold, by his joining in it as an eſſential party, or ſurrendering his eſtates, but even without aſking his conſent, or giving him any notice. By colluſion with the tenant for years, by ſecret practices, to take advantages of a vacant

poſſeſſion, when the tenant of the freehold was abſent from his houſe or land, he might execute a feoffment, and then ſuffer a common recovery, to anticipate that right which the law has wiſely and juſtly poſtponed, till he ſhould chance to ſucceed in the order of the intail. If this method of ſuffering recoveries were once eſtabliſhed as legal, the eldeſt ſons of the firſt families in *England*, who are tenants in tail in remainder, expectant on the eſtate for life of the father, might diſpoſe of the inheritance of their eſtates at the age of twenty-one, againſt the conſent, and in ſpite of the authority or the freehold of their parents. Conveyances to make a tenant to the *præcipe* in a common recovery, are conſidered as mere inſtruments to make parties in a fictitious action, to ſerve the purpoſe of him who means to ſuffer the recovery. Such a feoffee, as in the preſent caſe, was often called a mere *actor fabulæ*. If he was tenant for years of the lands conveyed by the feoffment before the making of it, his term would not merge in the fee-ſimple; no dower could ariſe out of it; his judgments or ſtatutes would not bind it. This being the uniform tenor of determinations in courts of law, in which the intent of the conveyance has been conſidered, and not the mere legal operation of it, it followed, that the validity of the eſtate muſt depend on the right and power of him who made it to ſuffer a recovery. If the feoffor had no ſuch right or power, his feoffment was void; and the eſtate conveyed, being founded in fraud, was as no eſtate, in judgment of law. The common law avowed theſe principles, and the Legiſlature had adopted

ed them; for the ſtatute 14 *Geo.* 2. c. 20. which was made to ſupport common recoveries againſt nice exceptions, and to raiſe preſumptions in favour of them after a limited time, moſt anxiouſly provides, that the perſons joining in ſuch recoveries ſhould have ſufficient eſtate and power to ſuffer the ſame; as if the Legiſlature had foreſeen the preſent caſe, and were aware and afraid that tenants in tail in remainder might, by colour of that law, in future times ſuffer common recoveries, without the concurrence of the true immediate owner of the freehold.

On the other ſide, it was argued, that this recovery was valid, and that *James Earle* was actually tenant of the freehold when judgment was given. Firſt, becauſe when Sir *Robert Atkyns* entered, in conſequence of the judgment which he obtained againſt Lady *Atkyns*, the jointreſs, he became tenant in tail in poſſeſſion. Secondly, becauſe even if he were only tenant for years, his feoffment would convey an eſtate of freehold. In ſupport of the firſt of theſe poſitions, it was argued, that a judgment is an act of law, and, whilſt it continues in force, deſtroys the title of the adverſe party. A judgment in ejectment, by which only the poſſeſſion is recovered, not only deſtroys the right of poſſeſſion which was in the adverſe party, but gives a right of poſſeſſion to the recoveror. If the judgment in ejectment did not produce this effect, the leſſor of the plaintiff could not enter, or be entitled to the writ of *habere facias poſſeſſionem;* but his having a right to enter and ſue out that writ, infers his right to the poſſeſſion.

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Whilſt the judgment ſtands in force, it removes an intervening eſtate out of the way, and, during that time, it is the ſame thing as if it had never exiſted, and the recoveror's right to the poſſeſſion will continue until judgment is reverſed by error, or falſified in another action. In conſequence of theſe principles, it followed, that the right to the poſſeſſion and the remainder in tail meeting in the ſame perſon, and that perſon being Sir *Robert Atkyns*, the poſſeſſion and the remainder in tail united, and Sir *Robert Atkyns* became ſeiſed of an eſtate tail executed, or, in other words, of an eſtate tail in poſſeſſion. If the nature of an action of ejectment, and the conſequence reſulting from a recovery in it, were conſidered, it would appear in a clearer light. An ejectment is a poſſeſſory action, in which almoſt all titles to land are tried; whether the party's title is to an eſtate in fee, tail, for life, or for years, the remedy is by one and the ſame action. In an action of ejectment, the plaintiff recovers only the poſſeſſion of the land, and the execution is of the poſſeſſion only; but if the leſſor of the plaintiff recovers only the poſſeſſion of the land, it may be aſked, how he becomes ſeiſed according to his title? To which, it may be anſwered, that when a perſon is in poſſeſſion by title, as every perſon is who enters in execution of a judgment in ejectment, becauſe the law does no wrong, the poſſeſſion and title unite; for it is a rule of law, that when a man, having a title to an eſtate, comes to the poſſeſſion of it by lawful means, he ſhall be in poſſeſſion according to his title. As where the title is to have a fee, he becomes ſeiſed in fee; where

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the title is to have an eſtate tail, he becomes ſeiſed of an eſtate tail, and ſo on, the law caſting the eſtate upon him according to his title: and, were it not ſo, an ejectment would be the moſt ineffectual remedy for the trial of titles to eſtates, and would never anſwer the purpoſe for which it was brought into uſe, if the leſſor of the plaintiff acquired no more than a bare poſſeſſion after an execution or entry on a judgment in ejectment. In ſupport of the ſecond poſition, it was ſaid, that a feoffment operated on the poſſeſſion, without any regard to the eſtate or intereſt of the feoffor. A grant operated on the eſtate or intereſt which the grantor had in the thing granted. To make a feoffment good and valid, nothing was requiſite but poſſeſſion; and, where the feoffor had the poſſeſſion, although it was but a bare and naked one, yet a freehold or fee-ſimple paſſed by reaſon of the livery. It was no plea in avoidance of a feoffment, that the feoffor had nothing in the land at the time of the feoffment, becauſe the land paſſed by the livery; if the operation of the feoffment was queſtioned, the only plea was, *ne enfeoffa pas*, which put in iſſue only the livery. Lord Chief Juſtice *Holt* laid it down as clear law, in the caſe of *Hunt* v. *Burne*, that if a leſſee for years makes a feoffment with livery, though the leſſor be on the land proteſting againſt it, yet the land paſſes, becauſe the leſſee was entitled to the poſſeſſion. And this opinion was ſupported by the determination in the caſe of *Read* and *Morpeth* v. *Errington*, where the queſtion was, if a feoffment by a leſſee for years, the leſſor being upon the land, was a good feoffment? for

Lit. ſ. 611. 698. 1 Inſt. 366 *b*.

Year-Book, 10 Ed. 4. 8, 9.

Cro. El. 321.

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it was pretended, that his being upon the land guarded it ſo that no feoffment could be made; but the court was of opinion, that the feoffment was good, becauſe the leſſee had the ſole right to the poſſeſſion, and livery ought always to be given of the poſſeſſion. Before the ſtatute of uſes, a *ceſtui que uſe* conveyed the uſe by bargain and ſale, and afterwards levied a fine to a ſtranger. And the queſtion was, whether the fine was not void, as neither of the parties had any thing in the land? for, by the bargain and ſale, the uſe was in the bargainee, and nothing was in the bargainor or in the ſtranger. It was argued, that if this fine was not good, great inconveniencies would follow, for that many recoveries had been ſuffered againſt the bargainor after he had conveyed the uſe: to which, *Fitzherbert* replied, "It is the folly of purchaſers that they do not "take a feoffment from the *ceſtui que uſe* before the "fine is levied; for if they do, the fine will be good. "I, for my part, (ſays he) will never purchaſe any "land without taking a feoffment, ſo that I may be "in poſſeſſion when the fine is levied; for then the fine "will undoubtedly be good." The poſſeſſion here ſpoken of muſt be a freehold at leaſt, becauſe nothing leſs than a freehold will ſupport a fine; for if neither the cognizor nor cognizee had an eſtate of freehold in poſſeſſion, remainder or reverſion, at the time of levying the fine, it would be void. The feoffment here ſpoken of is the feoffment of a *ceſtui que uſe* after he had parted with the uſe, and whilſt the freehold and inheritance of the eſtate was in the feoffees, ſo that it was the feoffment of a perſon who had only a bare and naked

Year-Book, 27 Hen. 8. 20

naked poſſeſſion (unaccompanied with right) to a ſtranger. This was the opinion, and this was the practice, of one of the greateſt lawyers of the age. The obſervations upon the opinion of *Fitzherbert* are, that if a feoffment from the *ceſtui que uſe* to a ſtranger, after he had conveyed the uſe, would have made the fine undoubtedly good, the like feoffment would have made a good tenant to the *præcipe;* and for this plain reaſon, becauſe the feoffment paſſed a freehold. There is a caſe in *Dyer* 340, where the feoffment of a perſon in remainder, in the abſence of the tenant for life, was determined to be a good feoffment. The caſe was, a remainder-man in fee enfeoffed a ſtranger, in the abſence of a tenant for life, who neither attorned nor aſſented to the feoffment, but occupied the eſtate during his life; and it was held to be a good feoffment for the fee-ſimple. And in the caſe before the court, the feoffment was made by Sir *Robert Atkyns* the remainder-man, in the abſence of the tenant for life, who neither attorned nor aſſented, and who occupied the eſtate during her life. A diſtinction was made between rightful and wrongful conveyances. A fine, releaſe, or bargain and ſale, are called rightful conveyances, and a feoffment a wrongful one; but no ſuch diſtinction exiſts, for all conveyances are in themſelves equally rightful, and are to be made uſe of according to the nature of the caſe to which they are applicable; that a freehold would not paſs by a fine, releaſe, or bargain and ſale, from a perſon who had only a bare and naked poſſeſſion, did not proceed from theſe conveyances being lawful ones, but from the nature of them, whoſe property it was to convey nothing

but what the maker of them might lawfully convey, because they operated as a grant; therefore, to infer from thence, that a freehold would not pass by a feoffment which was a conveyance of a different operation, and whose property was to pass a freehold and fee by force of the livery, was an inconclusive argument; every one who can get into possession has, and ever had, a power to make a feoffment, for the law makes no distinction of persons; and, whenever a tenant in tail in remainder had obtained the possession, whether by right or by wrong, and had done an act whilst in possession to make a tenant to the *præcipe*, in order to suffer a common recovery, no instance could be produced where such an act had been adjudged fraudulent, unfair, or irregular. The principal argument, opposed to the doctrine here laid down, might be reduced to the head of inconvenience. But the question was not, what inconvenience would attend the determination either way, but what was the law. The inconvenience, if there were one, arose from the nature and operation of a feoffment, and could not be avoided but by taking away that conveyance, or depriving it of an operation which it had been allowed to have by all the sages of the law. But, to do that, was not in the power of a court of justice, since no maxim of the common law could be abrogated or abolished, but by a legislative authority. It was once thought to be a great inconvenience, that a descent, immediately after a disseisin, should take away the entry of the person disseised; at another time, it was thought to be no small one, that the son should lose his patrimony because he happened to be born out of time; and, until lately,

lately, an heir might have been deprived of his family eſtate by the warranty of an anceſtor, who was never in poſſeſſion of it. Theſe inconveniencies were as great as that which was pretended to ariſe from the feoffment of a tenant in tail in remainder, expectant on an eſtate for life, and yet they continued through ages, till the Legiſlature took them away; when the law was doubtful, it might be allowable to draw an argument from inconvenience; but, where the law was clear and preciſe, as it was, that the feoffment of a perſon in poſſeſſion, let him come to the poſſeſſion how he would, paſſed a fee, an argument from inconvenience was not admiſſible, becauſe it tended to undermine and overthrow the law.

Lord *Mansfield* delivered the reſolution of the court, of which, I ſhall preſent the reader with an abſtract, as far as it relates to the validity of the recovery. "As "Lady *Atkyns* had an eſtate for life in the premiſes, "and did not join by ſurrender or otherwiſe, in any "conveyance of the freehold to *James Earle*, the te- "nant to the *præcipe*, the great queſtion is, whether "*James Earle* had acquired the freehold by diſſeiſin?" The better to judge of this queſtion, it will be proper to attempt finding out what the old law meant by a diſſeiſin, which conſtituted the tenant of the freehold, in reſpect of every demandant ſuing out a *præcipe*, although the owner's entry was not taken away; for, where the right of poſſeſſion was acquired, and the owner put to his real action, there, without doubt, the poſſeſſor had got the freehold, though by wrong.

Seiſin is a technical term, to denote the completion of that inveſtiture by which the tenant was admitted into the tenure, and without which no freehold could be conſtituted, or paſs. *Sciendum eſt feudum ſine inveſtitura nullo modo conſtitui poſſe.* Diſſeiſin muſt, therefore, mean, ſome way or other of turning the tenant out of his tenure, and uſurping his place and feudal relation. Formerly, no tenant could alien without licence from the lord; when the lord conſented, the only form of conveyance was by feoffment, publicly made *coram paribus*, with the lord's concurrence. Homage or fealty was ſolemnly ſworn, and ſuit of court and ſervices were frequently done. The freeholder repreſented the whole fee, did the duty to the lord, and defended the whole fee againſt ſtrangers. The freehold never could be in abeyance, becauſe the lord muſt never be at a loſs to know upon whom to call as his tenant; nor a ſtranger at a loſs to know againſt whom to bring his *præcipe*. From the neceſſity of there being always a viſible tenant of the freehold, and the notoriety who acted and did ſuit and ſervice as ſuch, many privileges were allowed to innocent perſons deriving title from the freeholder *de facto*. The ſtatute of *quia emptores terrarum*, and other ſtatutes which extended the power of alienation to the king's tenants *in capite*, the frequent releaſes of feudal ſervices, the ſtatutes of uſes and wills, and, at laſt, the total abolition of all military tenures, have left little more than the names of feoffment, ſeiſin, tenure, and freeholder, without any preciſe knowledge of the things originally ſignified by theſe ſounds. The idea which modern

Feud. lib. 1. Tit. 25.

times

times annex to freehold or freeholder, is taken merely from the duration of the eſtate. Copyholds, and the cuſtomary freeholds in the North, retain ſome faint traces of the old ſyſtem of feudal tenures. It is obvious how a man may viſibly be the copyholder or cuſtomary freeholder *de facto*, in prejudice of the rightful tenant. It is obvious too, that, uſurping ſuch copyhold or cuſtomary tenure, is a different fact from a naked poſſeſſion or occupation of the land; but whoever will look into the practice of other countries, where tenures ſubſiſt with all the ſolemnities of feoffments and ſeiſins, upon every change of a tenant by deſcent or alienation, and upon every uſurpation of the real right, will eaſily comprehend, that, formerly, it was as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation. Diſſeiſin is a complicated fact, and differs from diſpoſſeſſing. The freeholder by diſſeiſin differs from a poſſeſſor by wrong. *Bracton* puts many caſes of poſſeſſion wrongfully taken, which he calls intruſion, becauſe there was no diſſeiſin, *poſſeſſio quæ nuda eſt omnino, et ſine aliquo veſtimento quæ dicitur intruſio.* A particular tenant, according to the feudal notions was in as of the ſeiſin of the fee, of which his eſtate was a part; if he aliened the fee, which he could only do by ſolemn feoffment, with the concurrence of the lord of whom the fee was held, he forfeited his particular eſtate, for having betrayed his ſeiſin with which he was intruſted. But, on account of the privity and confidence between him and the reverſioner, and the notorious ſolemnity of the act of inveſtiture,

his feoffment diſſeiſed the reverſioner. *Bracton* mentions the diſſeiſin in this caſe, as a neceſſary conſequence, and as a thing which could not poſſibly be otherwiſe;—*item facit quia diſſeiſinam cum quis in ſeiſina fuerit ut de libero tenemento et ad vitam, vel ad terminum annorum, vel nomine cuſtodiæ, vel aliquo alio modo, alium feoffaverit in prejudicium veri domini et fecerit alteri liberum tenementum; cum duo ſimul et ſemel de eodem tenemento et in ſolidum eſſe non poſſunt in ſeiſina.* He conſidered it as impoſſible for the true tenant not to be put out, when the other actually came into his place. So late as the 32 *Eliz.* in the caſe of *Matheſon* v. *Trot*, 1 *Leon.* 209, the diſtinction upon which the judgment turned, was, "that *Henry Denny* gained a wrongful "poſſeſſion in fee, but did not gain any ſeiſin, ſo no "diſſeiſor, therefore the deſcent to his heir was not "privileged." The preciſe definition of what conſtituted a diſſeiſin, which made the diſſeiſor tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known, but it is not now to be found. The more we read, unleſs we are very careful to diſtinguiſh, the more we ſhall be confounded; for, after the aſſize of novel diſſeiſin was introduced, the Legiſlature, by many acts of parliament, and the courts of law, by liberal conſtructions in furtherance of juſtice, extended this remedy, for the ſake of the owner, to every treſpaſs or injury done to his real property, if, by bringing his aſſize, he thought fit to admit himſelf diſſeiſed. The law books treat of diſſeiſin with a view to the aſſize, which was the common method of trying titles till ejectment came into

uſe. *Littleton*, who wrote long after the remedy by aſſize was enlarged by ſtatutes, and, by an equitable latitude of conſtruction, ſpeaks of diſſeiſins principally as between the owner and treſpaſſer or poſſeſſor, with an eye to the remedy by aſſize. Theſe are the common places from whence many deſcriptions have been cited of a diſſeiſin; but ſuch authorities can give little light to the preſent queſtion, which depends upon the nature of ſuch a diſſeiſin as made the diſſeiſor tenant to every demandant and freeholder *de facto* in ſpite of the true owner. Though the term *diſſeiſin* happens to be the ſame, the thing ſignified by that word, as applied to the two caſes of actual diſſeiſin, or diſſeiſin by election, is very different. This diſtinction of diſſeiſin at election is made in the caſe of *Blundel* v. *Baugh*, *Cro. Car.* 302. In a manuſcript report of this caſe, much fuller than the printed one, the three judges, with whom agreed the four Judges of the Common Pleas, argued and held, "that the leſſee for years of "the tenant at will was a diſſeiſor, at the election of "the original leſſor, for the ſake of his remedy, but "never could be looked upon as the freeholder, or a "diſſeiſor in ſpite of the owner, or with regard to "third perſons." And the manuſcript note ſays, if a *præcipe* was brought againſt him, he might ſay, "I "am not tenant to the freehold." If a leſſee for life, or years, makes a feoffment, the leſſor may ſtill diſtrain for the rent, or charge the perſon to whom it is paid as a receiver, or bring an ejectment, and chooſe whether he will conſider himſelf as diſſeiſed, or not. *Metcalfe ex dem. Parry*, and others, which was a caſe re-

ſerved at *Salop* aſſizes, 25th *March* 1743, for the opinion of the Court of Exchequer, who gave judgment on the 24th of *November* 1743, was thus; Tenant in tail of lands leaſed by his father to a ſecond ſon for lives, (under a power), upon his father's death received the rent from the occupier, as owner; and, as if no ſuch leaſe had been made, he ſuffered a common recovery; it was held, that this was only a diſſeiſin of the freehold at election, and that, therefore, he could not make a good tenant to the *præcipe*, and the recovery was adjudged bad. I will now conſider, whether *James Earle* can be deemed a good tenant of the freehold by diſſeiſin. Diſſeiſin is a fact, it is not found; all the jury ſay is, that ſoon after the judgment in ejectment, Sir *Robert Atkyns* entered, and was in poſſeſſion. This muſt be taken to be an entry in conſequence of the judgment; it was ſo conſidered on ſettling the ſpecial verdict, otherwiſe the defendants have no caſe; for it is not found that Lady *Atkyns* was ever ouſted, or quitted the poſſeſſion, or that Sir *Robert* was ever ſeiſed. Taking poſſeſſion under a judgment in ejectment, never could be a diſſeiſin of the freehold. Suppoſe it a real proceeding, the termor of a diſſeiſee might, by the old law, recover againſt the diſſeiſor, he might recover againſt the feoffee of his leſſor, but he could never thereby become a diſſeiſor of the freehold; he never could be other than a termor, enjoying in the nature of a bailiff, by virtue of a real covenant. In reſpect of the freehold, his poſſeſſion enured always by right, and never by wrong. If the leſſor had enfeoffed, it enured to the alienee: if the leſſor

was

was diſſeiſed and might enter, it enured to the diſſeiſee; if his entry was taken away, it enured to the heir or feoffee of the diſſeiſor, who, in that caſe, had the right of poſſeſſion. Suppoſe the proceeding (as it is) a fictitious remedy, then in truth and ſubſtance a judgment in ejectment is a recovery of the poſſeſſion, not of the ſeiſin or freehold, without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it, in truth and ſubſtance can only be poſſeſſed, according to right, *prout lex poſtulat.* If he has a freehold, he is in as a freeholder; if he has a chattel intereſt, he is in as a termor; and in reſpect of the freehold, his poſſeſſion enures according to right. It is found that the ejectment was brought by Sir *Robert Atkyns* to recover the poſſeſſion, but it is not found that he claimed the freehold. The title muſt now be taken as in the ſpecial verdict, therefore it appears that he had no right to the poſſeſſion. His feoffee could be in no other condition than himſelf; he had a poſſeſſion without prejudice to the right, and could convey no other. He was not in as a particular tenant; there was no privity of any ſeiſin, he had only a naked poſſeſſion. But the caſe is ſtill ſtronger; the true owner cannot even elect to make a perſon in poſſeſſion, under a judgment in ejectment, a diſſeiſor. He could not bring an aſſize of *novel diſſeiſin*; the entry is not *injuſtè et ſine judicio*, but under the authority of a court of juſtice, and therefore lawful. There is ſtill behind, though it happens not to be neceſſary, a larger ground upon which to determine this queſtion, and more ſa-

tisfactory, becauſe more intelligible, from the nature of a common recovery now, and a feoffment to make a tenant to the *præcipe* with that view only. The ſenſe of wiſe men, and the general bent of the people in this country, have ever been againſt making land perpetually unalienable. The utility of the end was thought to juſtify any means to attain it. Nothing could be more agreeable to the law of tenures than a male fee unalienable; but this bent to ſet property free allowed the donee, after a ſon was born, to deſtroy the limitation, and break the condition of his inveſtiture. No ſooner had the ſtatute *de donis* repeated what the law of tenures ſaid before, that the tenor of the grant ſhould be obſerved, than the ſame bent permitted a tenant in tail of the freehold and inheritance to make an alienation voidable only under the name of a diſcontinuance; but this was a ſmall relief. At laſt, the people having groaned for two hundred years under the inconveniences of ſo much property being unalienable, and the great men, to raiſe the pride of their families, and, in thoſe turbulent times, to preſerve their eſtates from forfeiture, preventing any alteration by the legiſlature, the ſame bent threw out a fiction in *Taltarum*'s caſe, by which tenant in tail of the freehold and inheritance, or with the conſent of the freeholder, might alien abſolutely. Public utility adopted and gave a ſanction to the doctrine, for the real political reaſon, to break intails; but the oſtenſible reaſon from the fictitious recompence hampered ſucceeding times how to diſtinguiſh

caſes

caſes which were within the falſe reaſoning given, but not within the real policy of the invention, till at laſt the legiſlature applauded common recoveries by a variety of ſtatutes. As the legiſlature has for ages avowed the propoſition, we may now ſay, that common recoveries are a mere form of conveyance, all neceſſary circumſtances of form and ceremony are taken from its fictitious original. The policy of this ſpecies of alienation meant to take a middle way as to entails between perpetuities and abſolute property; alienations were allowed, yet in ſuch a ſhape as neceſſarily required deliberation and delay; and they were only allowed to be made by tenant in tail in poſſeſſion, or by tenant in tail in remainder, with the conſent of the owner of the firſt eſtate for life, the eldeſt ſon was reſtrained in the lifetime of his father or mother, or any other anceſtor or relation ſeiſed for life under a family ſettlement. The act of 14 *Geo.* 2. proceeds upon the parties to a recovery having power to ſuffer it: Sir *Robert Atkyns*, the ſon, had no right to ſuffer a common recovery, without the concurrence of the jointreſs; any contrivance therefore to do it, without her joining, is artifice and evaſion. If tenant in tail in poſſeſſion is diſſeiſed, though the *præcipe* be brought againſt the diſſeiſor, yet, if he is vouched, the recovery ſhall bar, becauſe he had power to bar. In *Jennings*'s caſe, 10 *Co.* 44. the recovery is ſupported, becauſe the parties had power to bar; by parity of reaſon this recovery ought not to be ſupported, becauſe the parties had no power; if it was, the law muſt be overturned.

Every,

Every remainder-man in tail might eaſily get a naked poſſeſſion, and make a ſecret feoffment. The plan of marriage, and other family ſettlements, is to limit a remainder to the firſt and every other ſon in tail; the negative which the father now has upon the eldeſt ſon's ſuffering a common recovery, is the very means and conſideration of getting the eſtate re-ſettled upon the marriage of the eldeſt ſon. By this method, the moment he attains to the age of twenty-one years, he may ſet his father at defiance, ſuffer a common recovery, and bar all the reſt of the family. This conſequence alone, in a caſe unprecedented, is a ſufficient objection. If before the introduction of common recoveries, as a conveyance, this queſtion had been agitated in an adverſary real action, upon a plea, that *Earle* was not tenant to the freehold, it would have been adjudged from the law, and artificial learning of tenures, that he could not be ſo conſidered. If the queſtion had been, whether tenant in tail in remainder ſhould, by ſuch an injurious entry and feoffment, acquire a benefit to himſelf, to the prejudice of his reverſioner, it would have been adjudged, from eternal principles of juſtice, that an act founded in wrong, ſhould not, by virtue of the crime itſelf, become legal for the author's advantage; as it is now agitated, when common recoveries are eſtabliſhed as a ſpecies of alienation, the only queſtion is, whether the rule of law, which requires the concurrence of the owner of the firſt eſtate for life, ſhall be overturned? It is better to ſubvert the rule directly, than ſuffer it to be done

done by a ſecret injurious entry and feoffment, which cannot be prevented, and which the owner may never hear of. There is no injury or wrong, for which the law does not provide a remedy. But if this ſtratagem ſhould prevail, redreſs muſt follow too late, unleſs the entry of the tenant for life ſhall avoid the recovery; if it would, there is an end of the preſent queſtion, for the jointreſs entered, and was intitled to the profits from Sir *Robert Atkyns* as a treſpaſſer *ab initio*.

In every light, and upon every ground of law, this recovery is bad.

Notwithſtanding theſe arguments, judgment was unanimouſly given for the defendant, on the ground that the plaintiff was barred by the ſtatute of limitations, the ejectment not having been brought within twenty years after the leſſor's title accrued. A writ of error was brought in the Houſe of Lords, where it was alſo determined that the plaintiff was barred by the ſtatute of limitations.

Vide Tit. 31. c. 2. ſ. 20.

John Atkyns, the plaintiff in this cauſe, having died without iſſue, the perſon who was next in remainder under the will of Sir *Robert Atkyns*, brought an ejectment for the recovery of the ſame premiſes: and the validity of this recovery having been again diſcuſſed in the Court of King's Bench in *Mich.* 18 *Geo.* 3. Mr. Juſtice *Aſton* delivered the opinion of himſelf, Mr. Juſtice

Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt*, (Lord *Manſfield* being abſent) that the recovery was void, becauſe *James Earle* was not a good tenant to the *præcipe*, and judgment was therefore given for the plaintiff. The arguments which were made on that occaſion are very accurately reported by Mr. *Cowper*; but as they are, the very ſame which had been uſed on the former hearing, it is unneceſſary to ſtate them.

Cowper's R. 689.

Bargain and Sale inrolled. Hynde's Caſe, 4 Rep. 71. Forreſter, 167.

§ 42. A good tenant to the *præcipe* may be made by bargain and ſale inrolled; and the bargainee may appear and vouch before entry, or before the bargain and ſale is inrolled, provided it be inrolled within ſix months, as preſcribed by the ſtatute: for although the freehold does not paſs from the bargainor until the inrolment, yet as ſoon as that is done, the freehold is conſidered as having paſſed from the bargainor, at the time when the bargain and ſale was executed, by relation. And as common recoveries are much favoured by the courts of law, a bargain and ſale to make a tenant to the *præcipe* will not be deemed void on account of any trifling miſtake or inaccuracy.

Vide Lloyd v. Lord Say and Sele, Tit. 32. c. 23. ſ. 16.

Leaſe and Releaſe.

Barker v. Keate, Tit. 32. c. 13. ſ. 13.

§ 45. A tenant to the *præcipe* may alſo be made by leaſe and releaſe; and the reſervation of a peppercorn in the bargain and ſale for a year, is a ſufficient conſideration to raiſe a uſe in the bargainee, ſo as to make

make the releaſe valid, for the purpoſe of ſupporting a common recovery.

§ 46. We have ſeen, that, in general, a common recovery cannot be valid without a tenant to the *præcipe*. Yet, in ſome caſes, a common recovery may operate by eſtoppel, although there be no tenant to the *præcipe*; but this is only where the perſon who ſuffers the common recovery is tenant in fee, for the iſſue in tail cannot be bound by eſtoppel, as they do not claim from their immediate anceſtors, but from the firſt purchaſers, *ſecundum formam doni.*

A Recovery may, in ſome Caſes, be good without a Tenant to the *Præcipe*. 10 Mod. 45. Godb. 147.

§ 47. Common recoveries having been long conſidered by the Judges, and alſo by the legiſlature, as common aſſurances, every ſort of favour has been ſhewn them; and as the validity of recoveries has frequently been called in queſtion, on account of irregularities in making a tenant to the *præcipe*, the following ſtatute was made to obviate that inconvenience.

Statute 14 Geo. 2.

Sect. 5. "Whereas it has frequently happened, that "the deeds for making the tenant to the writs of entry, or other writs for common recoveries, have "been loſt, or that the fines or deeds, making the "tenants to the ſaid writs, have not been levied or "executed till after the judgment given in ſuch recoveries, and the writ of ſeiſin awarded; by reaſon "whereof

14 Geo. 2. c. 20.

" whereof great doubts have arisen whether such " recoveries, for want of proper tenants to the writs, " are good and effectual in law: to prevent such " doubts for the future, and in order to render com- " mon recoveries more certain and effectual, be it " enacted, that every common recovery already suf- " fered, or hereafter to be suffered, shall, after the " expiration of twenty years from the time of the suffer- " ing thereof, be deemed good and valid to all intents " and purposes, if it appears upon the face of such " recovery that there was a tenant to the writ; " and if the persons joining in such recovery had a " sufficient estate and power to suffer the same, " notwithstanding the deed or deeds for making " the tenant to such writ should be lost, or not " appear."

Sect. 6. " And be it further enacted by the autho- " rity aforesaid, that, from and after the commence- " ment of this act, every recovery already suffered, " or hereafter to be suffered, shall be deemed good " and valid to all intents and purposes, notwithstand- " ing the fine, or deed or deeds, making the tenant " to such writ, should be levied or executed after the " time of the judgment given in such recovery, and " the award of the writ of seisin as aforesaid, pro- " vided the same appear to be levied or executed " before the end of the term, great session, session, or " assizes, in which such recovery was suffered, and " the persons joining in such recovery had a suf-

" ficient

" ficient eſtate and power to ſuffer the ſame as " aforeſaid."

§ 48. In ejectment, the jury found a ſpecial verdict that *Sarah Williams*, being tenant in tail of the premiſes in queſtion, conveyed the ſame by leaſe and releaſe, dated the 19th and 20th of *November* 1778, to a perſon to make him tenant to the *præcipe*, in order that a common recovery might be ſuffered, which was accordingly ſuffered, and a writ of ſeiſin awarded, teſted the 6th of the ſame month of *November*, returnable in 15 days of *St. Martin*; to which the ſheriff returned, that he, by virtue of the ſaid writ, on the 10th of *November* in the ſame term, did cauſe full ſeiſin of the premiſes therein mentioned to be delivered to the demandant. It was contended, that this recovery was void, for it appeared upon the record, that ſeiſin was delivered by the ſheriff ten days before the date of the conveyance to the tenant of the freehold, when in fact, *Sarah Williams* was in poſſeſſion of the lands; and that this caſe was not within the ſtatute 14 *Geo.* 2. c. 20. ſ. 5. which aroſe from the fictitious relation to the firſt day of the term, and was made for a different purpoſe, *viz.* to prevent recoveries being ſet aſide where the tenant to the *præcipe* was created by deed executed after the award of the writ of ſeiſin. The words of the 6th ſection of the act were, " executed after the time " of the judgment given and the *award* of the writ of " ſeiſin." But there was a material difference between the *award* and the *execution* of the writ; and the 7th

Goodright ex dem. Burton v. Rigby, H. Black. Rep. vol. 2. 46.

Pigot 58. Wilſon on Fines 348.

and 8th ſections expreſsly provide, that the act ſhould not be extended beyond its ſtrict limits. The counſel on the other ſide were ſtopped by the court, who ſaid, that though there might have been ſome doubt, if it had been found a fact, that ſeiſin was actually given on the 10th of *November*, yet the day named in the return was immaterial; for it was not neceſſary to name any particular day, and the return would have been good without it. All that was neceſſary was, that ſeiſin ſhould be delivered after the judgment, and before the return of the writ, and that the proceedings ſhould all be in the ſame term. That thoſe requiſites were complied with in the preſent caſe, which was directly within the ſtatute 14 *Geo.* 2. ſ. 5. and 6. As, therefore, the day mentioned in the ſheriff's return was repugnant to the reſt of the proceedings, it was to be rejected, and there muſt be judgment for the defendant.

Durnford and Eaſt's Rep. vol. 5. p. 177.

A writ of error was brought upon this judgment in the Court of King's Bench. Lord *Kenyon* obſerved, that the ſenſe of the clauſe in the ſtatute 14 *Geo.* 2. was, that the recovery ſhould be valid, provided the deed making a tenant to the *præcipe* was executed before the end of the term in which the recovery was ſuffered: and it appeared upon this verdict, that the deeds making the tenant to the *præcipe* were executed within the term. And though the ſtatute, in enumerating ſome of the defects for which remedy was to be applied, does not mention this particular defect, it has always

always been underſtood, that the act was intended to remedy every defect of this kind, provided that, which is there made a condition, be complied with, namely, the making of the tenant to the *præcipe* before the end of the term in which the recovery is ſuffered; nor could the words of the ſtatute be ſatisfied by any other conſtruction. The other Judges concurred in opinion with the Lord Chief Juſtice, and the judgment was affirmed.

TITLE XXXVI.

RECOVERY.

CHAP. IV.

Of Voucher.

§ 1. *Nature of.*
4. *Of vouching in Perſon or by Attorney.*
12. *Rules of Court reſpecting Warrants of Attorney.*
15. *Of the Writ of* Summoneas ad Warrantizandum.

Section 1.

Nature of.

IN deſcribing the manner of ſuffering a common recovery, it has been ſaid, that when the tenant to the *præcipe* appears in court to anſwer the demandant's writ, he, inſtead of defending the title to the land, calls on another perſon, who is ſuppoſed to have warranted the title to him at the time of the original purchaſe, and prays, that the ſaid perſon may be called in to defend the title which he warranted, or otherwiſe to give lands of equal value to thoſe which he ſhall loſe by the defect of his warranty.

§ 2. Where the *præcipe* is brought againſt the tenant in tail who vouches over the common vouchee, the recovery is ſaid to be with ſingle voucher. Where the *præcipe* is brought either againſt a prior tenant for life, or the alienee of the tenant in tail who vouches the tenant in tail, who comes upon the voucher and vouches

vouches over the common vouchee, the recovery is then ſaid to be with double voucher.

§ 3. In all real actions the demandant has a right to counterplead the voucher, (that is) to ſhew in his replication, that the tenant ought not to be allowed ſuch a voucher; and the vouchee might alſo counterplead the warranty, by ſhewing, that he was not obliged to warrant the lands to the tenant. But when a perſon is vouched to warranty, and enters of his own accord into the warranty, the law preſumes, that he parted with his firſt poſſeſſion with warranty; and comes in now to warrant the ſame poſſeſſion, otherwiſe he would not enter into the warranty, but would counterplead it, for he might demand the lien: and even if the tenant ſhewed a lien, he might counterplead it. But if he enters into the warranty without demanding a lien, no perſon can afterwards aver, that there was no warranty; for when the vouchee, by entering into the warranty, binds himſelf to render in value, in caſe the demandant recovers, the cauſe of the warranty is not examinable, either by a privy or a ſtranger; becauſe the law will preſume, that the vouchee was compellable to enter into the warranty, otherwiſe he would never run ſuch a riſque. Pigot 15. Idem.

§ 4. If the vouchee is preſent in court, he immediately enters into the warranty, in which caſe the entry in the record is thus: "And the ſaid *William*, "in his proper perſon, cometh and defendeth his "right; when, *&c.* and thereupon voucheth to war- "ranty *Roger Blagrave*, Eſquire, who is preſent here "in Of vouching in Perſon, or by Attorney.

" in court, in his proper perſon, and freely warranteth " to him the tenements aforeſaid."

§ 5. It frequently happens, that neither the tenant nor the perſon vouched can conveniently appear perſonally in court, in which caſe they make a warrant of attorney to ſome other perſon to appear in their ſtead. The warrant of attorney is thus:—" *A. B.* " puts in his place *C. D.* and *E. F.* his attornies, " jointly and ſeverally againſt *I. B.* to gain or loſe in " a plea of land, *&c.*" If the perſon who comes in as vouchee makes a warrant of attorney, it is thus:— " *I. K.* whom *A. B.* voucheth to warranty, putteth " in his place *L. M.* and *N. O.* his attornies, jointly " and ſeverally againſt *I. B.* to gain or loſe in a plea " of lands, *&c.*"

§ 6. The warrant of attorney muſt be acknowledged either before a judge, who muſt ſign it, or the juſtices of aſſize where the lands lie, or elſe before commiſſioners appointed by writ of *dedimus poteſtatem de attornato faciendo*, who muſt certify the names of the perſons whom the tenant or vouchee appoints for his attornies, under their hands and ſeals.

§ 7. By the ſtatute 23 *Eliz.* c. 3. ſ. 5. it is enacted, that every perſon who ſhall take the knowledge of any warrant of attorney of any tenant or vouchee for ſuffering of any common recovery, ſhall, with the certificate of the warrant of attorney, certify alſo the day and year whereon the ſame was acknowledged. And that no perſon who takes any ſuch knowledge of any warrant

warrant for any recovery, ſhall be bound to certify ſuch warrant, except it be within one year next after the ſaid knowledge taken; and that no clerk or officer ſhall receive any writ of entry, whereupon any common recovery is hereafter to paſs, unleſs the day of the knowledge of the warrant ſhall appear, in or by ſuch certificate.

§ 8. This writ of *dedimus poteſtatem* is not founded on the ſtatute of *Carliſle*, which only extends to perſons who acknowledge fines, but is a writ which was provided by the common law, enabling perſons, who could not appear in court, to appoint attornies in their ſtead. Fitz. N.B. 17.

§ 9. Where a common recovery is ſuffered in this manner, the warrant of attorney is the foundation of the recovery, all the ſubſequent proceedings being in fact mere matters of form; but ſtill the acknowledgment of a warrant of attorney may be void, and of conſequence the recovery ſuffered purſuant to ſuch a warrant of attorney, on account of any legal diſability in the perſon who acknowledges it, and ſuch diſability may be averred, in which it differs from the acknowledgment of a fine before commiſſioners appointed by a writ of *dedimus poteſtatem*, for the acknowledgment of a fine is the aſſent of the party to the accommodation of the ſuit, by which it is abſolutely compleated, and the entry of the concord is the ſame as entering up judgment; but the acknowledgment of a warrant of attorney to ſuffer a common recovery is nothing more than a judicial mode of appointing another per-

ſon to appear in court for the tenant or vouchee, and is no part of the record; hence theſe two acts are attended with very different conſequences.

Vide infra Wynne v. Wynne.

§ 10. It follows from theſe principles, that if a tenant or vouchee, who has appointed an attorney, for the purpoſe of ſuffering a common recovery, dies before ſuch attorney has actually appeared for him, the recovery will be void; becauſe the death of ſuch tenant or vouchee is a determination of the warrant of attorney, and this circumſtance may be averred, it not being contrary to the record.

Vide infra Sir N. Bacon's Caſe.

§ 11. If the warrant of attorney appears to have been given after judgment, the recovery will be void; for the writ of *dedimus poteſtatem de attornato faciendo* recites, that the writ of entry is pending, which is not the caſe after judgment: and the appearance of the attorney before the warrant was made, is without authority, and therefore void.

Rules of Court reſpecting Warrants of Attorney.

§ 12. By a rule of court, made in *Hil.* 14 *Geo.* 3. for the more effectual and certain proof of the due acknowledgment of warrants of attorney, taken from the tenants or vouchees in common recoveries, by virtue of any writ of *dedimus poteſtatem*, it is ordered by the court, "that no common recovery, wherein "the tenant or tenants, vouchee or vouchees, or any "of them, ſhall appear and defend by attorney, ſhall "be arraigned at the bar, unleſs an affidavit or affi-"davits, in writing, on parchment, ſhall be made "and annexed to a copy of the *præcipe*, and warrant

"or

" or warrants of attorney, acknowledged by ſuch " tenant or tenants, vouchee or vouchees, by virtue " of any writ or writs of *dedimus poteſtatem*, in which " affidavit or affidavits, the perſon or perſons making " the ſame, ſhall ſwear that he or they knew the party " or parties acknowledging ſuch warrant or warrants " of attorney; that the ſame was or were duly ſigned " and acknowledged, upon the day and year, or ſe- " veral days and years mentioned in the caption, or " ſeveral captions thereof, that the party or parties " acknowledging, and alſo the commiſſioners taking " the ſame, were all of full age and competent un- " derſtanding. That the femes covert (if any) were " ſolely and ſeparately examined apart from their huſ- " bands, and freely and voluntarily conſented to ac- " knowledge the ſame. That all the ſaid parties " knew the ſame warrant or warrants of attorney was " or were intended for ſuffering a common recovery " to paſs his, her, or their eſtate or eſtates. And " further, that the razure or razures, interlineation " or interlineations, (if any) in the body or caption " of ſuch original warrant or warrants of attorney, " was or were made before the ſaid parties, or any of " them ſigned the ſaid warrant or warrants, and before " the commiſſioners ſigned the ſaid caption or cap- " tions; which affidavit or affidavits (together with the " ſaid copy of the *præcipe*, and warrant or warrants " of attorney, whereunto the ſame ſhall be annexed) " ſhall be filed in the office of enrollment of writs for " fines and recoveries. And it is ordered, that all and " every ſuch affidavit or affidavits, as aforeſaid, ſhall be " made by ſome attorney or attornies of the courts of

" *Weſtminſter-hall*, or of the ſeſſions in *Wales*, or of " the counties palatine of *Cheſter*, *Lancaſter*, or *Dur-* " *ham*; and ſhall be ſworn before a perſon duly " authorized to take affidavits in this court, except " where the party or parties reſpectively, at the time " of their acknowledging ſuch warrant or warrants of " attorney, ſhall be in that part of *Great Britain* " called *Scotland*, or in *Ireland*, or in ſome other " parts beyond the ſeas. And in caſe the ſaid party " or parties ſhall be in *Scotland*, then the ſaid affidavit " or affidavits ſhall be made by one of the clerks of " his Majeſty's ſignet, and ſworn before one of the " Judges, or other perſon duly authorized to take " affidavits or depoſitions, in the Court of Seſſion, or " Court of Exchequer, in that part of the united " kingdom. But if the ſaid party or parties ſhall be " in *Ireland*, or in any other parts beyond the ſeas, " then the ſaid affidavit or affidavits ſhall be made by " one of the commiſſioners who hath taken the ac- " knowledgment of ſuch warrant or warrants of " attorney, and ſhall be ſworn either before ſome " perſon duly authorized to take affidavits in this " court, or before ſome magiſtrate of the place where " ſuch acknowledgment ſhall be taken, having autho- " rity to adminiſter an oath, and in the preſence of a " public notary, which notary ſhall alſo certify in " writing, under his hand and ſeal, as well the due " adminiſtering of the ſaid oath, as alſo the name, " ſignature, and office of the magiſtrate adminiſtering " the ſame."

§ 13. By

§ 13. By a rule of court *Mich.* 29 *Geo.* 3. it is ordered, that no common recovery be ſuffered to paſs, unleſs the taking of the warrants of attorney be before one of the Juſtices or Barons of his Majeſty's courts of record at *Weſtminſter*, or one of the Serjeants at Law, unleſs an affidavit be made and filed, ſtating that the commiſſioners taking the ſame are either barriſters of five years ſtanding, or ſolicitors or attornies of ſome of the courts in *Weſtminſter-hall*, the Judges of the Court of Seſſion or Exchequer, or advocates or clerks of the ſignet of five years ſtanding in *Scotland*.

Ex parte Worſeley, 2 H. Black. R. 275.

§ 14. By a rule of the Court of Common Pleas made *Trin.* 30 *Geo.* 3. it is ordered that, from and after the firſt day of *Mich.* term then next enſuing, in every common recovery wherein the tenant or tenants, or the vouchee or vouchees, warrant or warrants of attorney ſhall be taken under a *dedimus poteſtatem*, there ſhall be written on every copy of the *præcipe*, and of ſuch warrant of attorney having ſuch affidavit or affidavits as is or are required by the rule of this court made in *Hil.* 14 *Geo.* 3. thereto annexed the *allocatur* of the Lord Chief Juſtice, or ſome one other of the juſtices of this court, in the ſame or like manner as *allocaturs* are now written on fines taken by *dedimus poteſtatem*; and the copy of the *præcipe* and warrant or warrants of attorney with the *allocatur* thereon, ſhall be filed as directed by the ſaid rule; and that at the time of ſigning ſuch *allocatur*, the writ of entry for ſuch common recovery ſhall be produced before the judge ſigning ſuch *allocatur*, who may mark ſuch writ with his title, name, or initials thereon; and

1 H. Black. R. P. 527.

ſuch

ſuch writ ſhall alſo be produced at the time of the arraignment of ſuch recovery.

Of the Writ of *Summoneas ad Warrantizandum*, 1 Leon. 86.

§ 15. If the perſon whom the tenant vouches is not in court, then a writ called a writ of *ſummoneas ad warrantizandum* iſſues to compel the perſon called upon to appear in court, and warrant the lands.

Booth 43. Pigot 148.

§ 16. In adverſary ſuits, if upon a *ſummoneas ad warrantizandum*, the ſheriff returned the vouchee ſummoned, and the vouchee made default, a capias *ad valentiam iſſued* for the tenant; but if the ſheriff returned *nihil* upon the ſummons, an *alias* and a *pluries* iſſued, and then a *ſequatur ſub ſuo periculo*. And if the vouchee ſtill made default, judgment was given for the demandant, but no judgment was given for the tenant, becauſe it appeared that the vouchee had not aſſets.

§ 17. Where the vouchee appears by attorney, the warrant by which he conſtitutes an attorney ought to bear date after the teſte of the writ of ſummons; but however the omiſſion of this circumſtance will not invalidate a recovery.

Wynne v. Lloyd, 1 Lev. 130. Sir T. Ray. 16. 1 Sid. 213. 1 Keb. 459.

§ 18. Thus in a writ of error to reverſe a common recovery, the error inſiſted on was, that the warrant of attorney of the vouchee bore date before the writ of *ſummoneas ad warrantizandum* iſſued, but it was anſwered that the vouchee might appear in perſon without any ſummons, and therefore the recovery was good, and the proceſs void. And the court ſaid, that a common

a common recovery being a common aſſurance, they would intend another warrant of attorney made in due time.

§ 19. When the vouchee has entered into the warranty, he comes in *loco tenentis;* and, in judgment of law, is tenant to the demandant. And then the demandant counts againſt him as he did before againſt the tenant, and the vouchee may plead all thoſe pleas which the tenant might have pleaded, and alſo any pleas which may ariſe after he has entered into warranty. 1 Inſt. 265 *b.*

§ 20. Thus if a *præcipe, quod reddat,* is brought againſt *A,* who vouches *B.* who enters into warranty, and afterwards the demandant releaſes all his right to *A.* although *A.* himſelf cannot plead this releaſe, becauſe from the time when *B.* entered into the warranty *A,* is not before the court, yet *B.* may plead this releaſe, or may plead a releaſe to himſelf from the demandant. Jenk. Cent. 100.

§ 21. The demandant may releaſe to the vouchee, although the vouchee has nothing in the land; for when the vouchee enters into the warranty, he becomes tenant to the demandant, and may render the land to him, on account of the privity which is between them. 3 Rep. 29.

§ 22. If a fine be levied by a vouchee to the demandant, or by the demandant to a vouchee, it will be Idem.

be good, becauſe the vouchee is ſuppoſed to have the freehold.

§ 23. By the common law, a writ of *ſummoneas ad warrantizandum* had nine returns. By the ſtatute 16 *Car.* 2. c. 16. ſ. 10. the returns were abridged to five; and now, by the ſtatute 24 *Geo.* 2. c. 48. ſ. 8. they are reduced to four incluſive; as if the writ of entry is returnable on the morrow of *All Souls*, then the writ of *ſummoneas* muſt be returnable from the day of *St. Martin* in fifteen days, being the fourth and laſt return of *Michaelmas* term. And if there are three vouchers, the writ of ſummons for the ſecond vouchee is to be returnable four returns (both incluſive) from the return of the ſummons of the firſt vouchee; and writs of ſummons are teſted four days incluſive, from the writ of entry.

§ 24. The Court of Common Pleas will not enlarge the return of a writ of ſummons, ſo as to make a term intervene between the teſte and the return.

Barnard v. Woodcock, 2 Black. R. 1201.

§ 25. Thus, where a motion was made in *Eaſter* term 18 *Geo.* 3. that the writ of ſummons in five recoveries might be teſted in the *Michaelmas* term preceding, and be made returnable in that *Eaſter* term, inſtead of the uſual courſe, authorized by the ſtatute 24 *Geo.* 2. c. 48. which is, that it ſhould be teſted the fourth day incluſive, from the return of the writ of entry, and be returnable the fourth return after the return of the writ of entry; in conſequence of which, writs

writs of ſummons muſt be returnable either in the ſame term in which they were teſted, or, at fartheſt, in the very next term.—The occaſion of this application was, that Earl *Cowper*, the vouchee, had acknowledged the warrants of attorney to appear to the ſummons, before commiſſioners appointed by *dedimus* (which recited the ſummons as returnable in the preceding *Hilary* term) at *Florence*, on the 13th *December*, 1777, but they did not arrive in *England* till after the end of *Hilary* term; and as the return is uſually of the ſame term wherein the recovery is in fact arraigned at bar, and the *teſte* muſt precede the actual acknowledgment of the warrant of attorney by the vouchee, this proceeding could not be made regular, without ſuing out a writ of ſummons with a much longer return than the courſe of practice will at preſent allow. The like inconvenience muſt occur whenever the vouchee dwells in any diſtant country, as the *Eaſt* or *Weſt Indies*; but that objection had been uſed to be cured in a very unwarrantable manner, by altering the date of the caption after it arrived in *England*, ſo as to ſuit the term in which the recovery was arraigned, till the late rule of the court in *Hilary* term 14 *Geo.* 3. (which directs *inter alia* an affidavit to be made of the true time of taking the caption) put a ſtop to this, among other groſs irregularities in the practice of ſuffering recoveries.

The court conceived that they had not power to make ſuch a rule, or at leaſt, that as they could not foreſee all its conſequences, it would be highly imprudent to authorize ſuch a proceeding, by a previous

direction from the bench; but intimated, that no blame ſhould fall on the officer, who ſhould make out the proceſs as prayed for, but the ſame to be at the hazard of the parties, and without prejudice to any future queſtion that might ariſe, on the validity of ſuch recoveries.

Gibbons v. Stevenſon, 2 Black. R. 1223.

§ 26. A motion, ſimilar to this one, was made in *Mich.* 19 *Geo.* 3. and received the ſame denial from the court. The facts were, that the *dedimus* was teſted the 26th *February*, 1777, and recited a writ of ſummons, returnable the firſt day of *Eaſter* term, 1777; ſo that, properly, the ſummons ſhould have been returnable, and the recovery had, in *Hilary*, 1778, which the diſtance rendered impoſſible.—Therefore, on application to the Maſter of the *Rolls*, he ordered the curſitor to make out a writ of entry, returnable in *Michaelmas* term, 1777; upon which the officer made out a writ of ſummons, returnable in the next *Hilary* term, of which term the tenant's appearance was entered. And then they imparled from *Hilary* to *Eaſter*, from *Eaſter* to *Trinity*, and from *Trinity* to *Michaelmas*, when the recovery was arraigned. And if the vouchee was then living, it was apprehended that the recovery would be valid; but, if he was dead, it would be erroneous.

TITLE XXXVI.

RECOVERY.

CHAP. V.

Of Judgment.

§ 1. *Nature of.*
5. *Relation of Judgments to the Firſt or other Day of Term.*
§ 15. *Judgment cannot be given on a Sunday.*

Section 1.

IN Conſequence of the default made by the perſon who is laſt vouched in a common recovery, and his departure in deſpite of the court, judgment is given that the demandant ſhall recover ſeiſin of the lands in queſtion, and that the tenant ſhall recover againſt the vouchee, lands of equal value to thoſe warranted by him, and now loſt by his default. And as ſoon as judgment is given, the recovery becomes binding on all the parties to it, and their heirs. Nature of.

§ 2. The entry of the judgment upon the record is thus: " therefore it is conſidered, that the aforeſaid " *W. G.* do recover his ſeiſin againſt the ſaid *W. L.* of " the tenements aforeſaid, with the appurtenances, " and that the ſaid *W. L.* have of the lands of the " aforeſaid *W. G.* to the value," &c.

§ 3. If

§ 3. If judgment be given in a common recovery, before the return of the writ of entry, or the return of the writ of *ſummoneas ad warrantizandum*, it is void, becauſe the court has no power to proceed until the return of the writ of entry, and the appearance of the vouchee; for the parties are not ſuppoſed to appear until the return of that proceſs, which iſſues for the ſole purpoſe of bringing them into court.

§ 4. In every ſpecies of action, the death of either of the contending parties puts an end to the ſuit; and, therefore, in a common recovery, if either the demandant, the tenant, or any of the vouchees dies before judgment is given, the recovery is void.

Relation of Judgments to the Firſt or other Day of the Term.

4 Rep. 71 *a.*
2 Black. Rep. 735.
1 Stra. 18.
Pigot 59.

§ 5. Judgments, however, are not always conſidered as having been given on the day on which they are pronounced, but have frequently a relation to the firſt or ſome other day of the term in which they are given: and if all the parties are living on the day to which the judgment relates, the recovery will be good, for the judges take no notice of the day on which the recovery was paſſed in court.

Cro. Car. 102.
1 Bulſt. 32. 35.
3 Durnford and Eaſt's Rep. 185.

§ 6. The term in law is conſidered to many purpoſes as but one day; and, therefore, if judgment be given at any time during a term, it relates to the firſt day of that term, and is conſidered in law as having been given on that day; and the firſt day of term is the eſſoin-day, for the *quarto die poſt* is only a day of grace.

§ 7. However,

§ 7. However, if a writ of entry is returnable on the ſecond, or any other return-day of the term, judgment will then relate to that return-day, and not to the firſt day of the term; for the courts will not conſider the judgment in a recovery to have been given prior to the return of the writ of entry. And where the term, by the proceedings in it, ſuffers a diviſion, as, where any proceſs iſſues, during the continuance of the term, then the judgment relates to the eſſoin-day of the return of that proceſs, and not to the firſt day of the term.

Selwin v. Selwin, 2 Bur. 1131.

§ 8. It follows, from theſe poſitions, that when the vouchee in a common recovery, appears in perſon at the return of the writ of entry, then the judgment relates to the return-day of the writ of entry, and is conſidered, in law, as having been given on that day; but if the vouchee appears upon a writ of *ſummoneas ad warantizandum*, then the judgment relates to the day of the return of that writ.

§ 9. Thus, where *Edward Shelley* ſuffered a common recovery, in which he was vouched by attorney on the 9th day of *October* (which was then the firſt day of *Michaelmas* term), and died before ſix in the morning of that day; the recovery was paſſed that day about ten o'clock, and it was adjudged that the death of *Edward Shelley* did not invalidate the recovery, for the writ of entry was returnable on the *octave* of *St. Michael*, and the judgment had relation to that day, which was the ſaid 9th day of *October*, on which day the vouchee was alive, and the law makes no fractions of a day.

Shelley's Caſe, 1 Rep. 93. Moor 136. Jenk. Cent. 249.

§ 10. If a warrant of attorney bears date after the return-day of the writ of entry on which a recovery is ſuffered, the recovery will be void; becauſe the judgment relates back to the return-day of the writ of entry.

Sir Nich. Bacon's Caſe, Dyer 220.

§ 11. Thus, where the writ of entry was returnable on the *octave* of *St. Michael*, which was the 9th day of *October*, the writ of *dedimus poteſtatem de attornato faciendo* bore date the 11th of *October*, and the *mittimus* thereof bore date the 30th of *October*; the recovery was adjudged to be erroneous, becauſe the judgment, on whatever day of the term it was given, related back to the return-day of the writ of entry, which was the firſt day of the term, ſo that the warrant of attorney was made after the time when the judgment was ſuppoſed to be given.

§ 12. If a vouchee in a common recovery, who comes in upon a writ of *ſummoneas ad warrantizandum*, and appears by attorney, dies before the return of the writ of *ſummoneas*, the recovery is void; becauſe the judgment could not poſſibly have been given in ſuch recovery until the vouchee had appeared in court and made default; and as the vouchee could not appear until the return of that proceſs, which iſſued for the ſole purpoſe of bringing him into court, it follows, that judgment muſt have been given after the death of the vouchee, which was a determination of the warrant of attorney; and theſe facts being collateral to the record, may be aſſigned for error.

§ 13. Thus,

§ 13. Thus, in a writ of error to reverſe a common recovery, it appeared by the record, that a writ of entry *ſur diſſeiſin en le poſt* was brought by Sir *Watkin Williams Wynne*, returnable *quinden. Paſch.* 13 *Geo.* 2. againſt *William Thomas*, who appeared in perſon and vouched *James Apperley* and *Alithea* his wife; whereupon a writ of *ſummoneas ad warrantizandum* was awarded, returnable in *craſtino aſcenſionis domini* (which was on the 16th of *May*), on which day the ſaid *James Apperley* and *Alithea* his wife appeared by *Joſiah Hodſon* their attorney, and entered into warranty, and vouched over the common vouchee, who made default, whereupon judgment was given, and a writ of ſeiſin awarded; and the ſheriff returned that he had delivered ſeiſin. The error aſſigned was, that *Alithea* died before judgment was given in the ſaid recovery, and for this the plaintiff in error prayed, that the recovery might be reverſed. Iſſue was joined, that *Alithea* did not die before judgment. A ſpecial verdict was found, that *Alithea* died on the 10th day of *May*, ſix days before the return of the writ of *ſummoneas ad warrantizandum*, but whether ſhe died before judgment or not, the jurors left to the opinion of the court. This caſe was argued on behalf of the plaintiff in error, by Mr. *Clive*, who made two points; firſt, That the death of *Alithea Apperley*, vouchee and tenant in tail, as found by the ſpecial verdict, made the judgment in the common recovery erroneous. Secondly, That upon the whole record, and the continuances as entered, the judgment appeared to be given, and the recovery paſſed, after the death of the vouchee, and could not be made good by relation, as a judgment of recovery in her

Wynne v. Wynne, 1 Wilſ. R. 35.

MSS. note.

lifetime. In ſupport of theſe poſitions, he argued, that recoveries were erroneous, where the vouchee or other neceſſary party did not appear, either in perſon or by attorney; for, without an appearance, there could be no warranty, no vouching over the common vouchee, and, conſequently, no judgment. In this caſe, *Alithea*, the vouchee, did not appear in perſon; the firſt conſideration, therefore, was, whether the appearance of *Joſiah Hodgſon*, her attorney, was a proper appearance or not. And, with regard to that matter, taking the facts ſimply as they appear on the record, the vouchee neither appeared in perſon nor by attorney, for the death of the vouchee, before the time when the attorney actually appeared, was a determination of the warrant of attorney. In the caſe of *Wynne* v. *Lloyd*, the error aſſigned was, that there was no warrant of attorney at the time of appearance, for it appeared the *teſte* of the warrant of attorney was after appearance; the court in effect agreed, that an appearance, without a warrant of attorney, was error, even in the caſe of a perſon of full age, but they made the recovery good by an intendment, that the vouchee came in *gratis* before the writ of ſummons, and made a new warrant of attorney in due time; which ſhewed there muſt be a warrant of attorney whenever the vouchee appeared by attorney. If a tenant in tail within age is vouched in a common recovery, and appears by attorney, it may be aſſigned for error, for ſuch an appearance is void. If warrants of attorney were not duly filed, it was error ſufficient to reverſe or arreſt a judgment after verdict, before the ſtatutes 32 *Hen.* 8. c. 30. and 18 *Eliz.* c. 14. and, ſince theſe ſtatutes, it is ſtill error, except after verdict;

Ante ch. 4.

Darcy, Jackſon, Palmer 224. Holland v. Dantzey, Cr. Eliz. 739.

verdict; for the ſtatute 4 and 5 *Ann*, c. 16. which extends theſe ſtatutes of jeofails to judgments by default, *&c.* (which is the preſent caſe) has a ſaving, ſo as there be an original writ or bill, and warrants of attorney duly filed, according to the law, as is now uſed. If the want of form in filing them was error, want of authority in the attorney, by reaſon of the determination of his warrant, was much more erroneous. Therefore, if a vouchee muſt appear in perſon, or by attorney, before judgment can be given, and, where the appearance is by attorney, if ſuch attorney muſt have a proper warrant or authority to appear, and the want of ſuch warrant is error, it is equally certain that the death of the vouchee before appearance, is a countermand or determination of the warrant of attorney; for a warrant of attorney to appear or confeſs judgment, is a naked authority, not coupled with any intereſt, and no more than an inſtrument, enabling the attorney to do an act which the principal himſelf might have done in perſon; and as it is abſurd to ſay that a man can acknowledge a judgment or appear in a court of juſtice after he is dead, ſo it is as unreaſonable to admit, that another perſon ſhould be capable of repreſenting him on ſuch occaſions. The perſonal capacity of the principal, and the derivative authority of the attorney, are founded on the ſame principle, namely, the life of the party, and, therefore, they muſt both end at his death. If a man gives a warrant of attorney to confeſs judgment, and dies before the judgment is confeſſed, the death is a countermand. If a tenant or vouchee died before judgment, and judgment had afterwards been entered, it would be erroneous. Thus, where a writ

1 Inſt. 52 *b*, 1 Vent. 310. Salk. 87.

Jourden v. Denny, 2 Bulſt. 241.

of error was brought to reverſe a judgment in *C. B.* the error aſſigned was, that judgment was given againſt a dead perſon, the defendant dying after the day of *Niſi Prius*, and before the day in bank: and the court were all of opinion, that the judgment being given againſt a defendant who was dead, it was erroneous, and muſt be reverſed. That caſe was before the ſtatute 17 *Car.* 2. c. 8. which provides a remedy where either party dies after a verdict, and before judgment, and gives a power to enter up judgment within two terms after the verdict. The caſe was the ſame at common law before the ſtatute 17 *Car.* 2. c. 8. But by the ſtatute 8 and 9 *Wil.* 3. c. 11. ſ. 6. it is provided, that if a plaintiff or defendant dies after an interlocutory, and before a final judgment, the action ſhall not abate, but the plaintiff may, notwithſtanding, proceed to a final judgment. Theſe ſtatutes ſhew what the common law was, and how a judgment againſt a dead perſon was to be conſidered. If a tenant in a real action dies pending the writ, and judgment is afterwards given, it is error, becauſe given againſt a dead perſon. Thus the common law ſtands with regard to plaintiffs or defendants dying before judgment, in real and perſonal actions; and there is no act of parliament which alters the common law in this caſe. The preſent action is a real action; it is a writ of entry upon a diſſeiſin, and *Alithea Apperley* the vouchee, after appearance, and entering into the warranty (admitting that to be the caſe) was the tenant in law, and her death before judgment, was the ſame as if any other tenant had died, in caſe an action had been only between demandant and tenant, without any vouchee. Every vouchee may take

1 Roll. Ab. 768.

take advantage of any error between the other parties: the ſecond vouchee may aſſign error between the tenant and the firſt vouchee. The reaſon is, becauſe the judgments are ſeveral and diſtinct, for in every common recovery there are ſeveral judgments, and ſeveral recoveries are included, and it ought to appear, that all of them are regular and againſt proper parties, and that all the parties are before the court. *Littleton* ſays, if in a *præcipe quod reddat* the tenant vouches, and the vouchee enters into a warranty, if, afterwards, the demandant releaſes to the vouchee, it is good; for the vouchee, after he hath entered into the warranty, is tenant in law to the demandant. So, in 1 *Inſt.* 265 *b.* it is ſaid, that when the vouchee enters into the warranty, he becomes tenant to the demandant, and may render the land to him in reſpect of the privity between them. Theſe authorities ſhew, that the ſame regularity, even in proceſs, is required to bring in the vouchee upon a voucher, as is requiſite to bring in the tenant at firſt; and that the vouchee, after he hath agreed and entered into the warranty, is conſidered in this action as actual tenant of the freehold: and it has been ſhewn, that if the tenant dies before judgment, it is error, and the law is the ſame if the vouchee dies before judgment. It follows, that as the verdict finds the vouchee died upon the 10th of *May*, which by the record appears to be prior in time to any appearance of the vouchee, (for that was not until the 16th of of *May*), and no judgment was or could be given till after appearance, that, therefore, it is an erroneous judgment, being given after the death of the vouchee.

S. 491.

Pigot 196.

With reſpect to the ſecond point, two objections were made by the counſel for the defendant; firſt, that the aſſignment of error, and finding the ſpecial verdict, was againſt the record; and, ſecondly, that the judgment had relation back to the firſt day of the term, on which day the vouchee was alive. The argument reſpecting the firſt of theſe objections, will be ſtated in the laſt chapter of this work.

As to the ſecond objection, it was true, that the term to many purpoſes was conſidered as but one day, and that a judgment given the laſt day of the term, related back to the firſt day: but this rule was only applicable to caſes between plaintiffs and defendants, where there was no continuance entered from one day to another in the ſame term, no fraction of the term by any thing appearing on the record, nor no injury to any third perſon; as it is one entire tranſaction on the record of that term, it is all conſidered as done on the firſt day of the term. But this judgment differs materially from the ordinary courſe of judgments, to which the rule of relation is generally applied: the record ſhews, that the term cannot, on this occaſion, be conſidered as one day, for the continuance from one day to another ſhews, that different facts were done on different days, in the ſame term. On theſe days of continuance the parties might have ſhewn any matter to the court; they might have ſhewn on the morrow of the Aſcenſion, that *Alithea* was dead, that ſhe died on the 10th of *May*, and then the recovery would not have paſſed. Theſe continuances, therefore, take away all preſumption and poſſibility, that the judgment was given

given on the firſt day of the term, for ſuch a preſumption would be directly contrary to the record; and it would be an extraordinary doctrine to ſay, that no averment ſhall be admited againſt a record, and yet that the court ſhall be at liberty to preſume a matter againſt a record, *viz.* when the record ſays a *placitum* was pending on the 16th day of *May*, that the court ſhould preſume the judgment was given long before that period. The relation or fiction of law, in the ordinary courſe of judgments, is not againſt the record; and that is the reaſon why the court ſhould not conſider this judgment as given the firſt day of term, *ſtabitur præſumptio donec probetur in contrarium;* and here is the higheſt evidence to the contrary, the record itſelf. In *Shelley*'s caſe, the recovery was held to be good, becauſe he was alive on the day on which judgment was given, though he died before the court ſat, becauſe the court would not allow a fraction of a day; but if he had died the day after judgment was given, it would have been void; for, although the court would not allow a fraction of a day, yet it would allow a fraction of a term. All the court did in *Shelley*'s caſe, was extending the relation to the firſt inſtant of the day, in ſupport of a judgment given on that day. A judgment ſhall have relation to the firſt day of the term, as if it was given on that very day, unleſs there is a memorandum to the contrary on the record, as where there is a continuance of the cauſe until another day in the ſame term, and the preſent cauſe was continued until another day in the ſame term. In all caſes of judgments by default, they do not relate back to the eſſoin day, which is the firſt day of term, but to the Bulſ. 35.

the *quarto die poſt*; for the court takes notice judicially, that the party was not demandable before that day, and conſequently, could not till then be guilty of a default; he might have appeared the firſt day of term, if he pleaſed, and then the judgment would have been given on the firſt day of term. So here the vouchee might have come in *gratis* before the morrow of the Aſcenſion, but ſhe did not; there was no appearance until that time, and, as the judgment could not have been given until that day, it cannot relate back to a prior day, ſo as to prejudice a third perſon. Theſe reaſons and caſes ſhew, that judgments do not univerſally, and in all caſes, relate to the firſt day of term, and, particularly, that the judgment in the preſent caſe cannot have ſuch a relation, becauſe the record ſhews it is impoſſible that it ſhould.

This caſe was ſeveral times ſolemnly argued at the bar of the King's Bench, and Lord Chief Juſtice *Lee* for himſelf and the other Judges gave judgment. And in ſumming up the arguments, he reduced them to theſe three principal points. 1ſt, That it was inſiſted on for the defendant in error, that a recovery was a common aſſurance, and as the vouchee had done all he could (if he had lived) to perfect it, the court would give it an equitable conſtruction, and not ſuffer it to be reverſed for ſo ſmall a fault, if it ſhould be deemed one. 2dly, That the recovery ſhould be deemed perfect from the firſt day of the term wherein it was paſſed, and then the vouchee was alive. And though the judgment was actually given after his death, yet that ſhould have relation to the firſt day of term, as in the caſe of many

many other judgments. 3dly, That as the vouchee appeared by attorney at the return of the ſummons, and that appearance was entered on record, this was an error in fact againſt the record, which would not be allowed.

To theſe three objections to the writ of error, the court gave theſe anſwers; that as to the firſt, the recovery being a common aſſurance, ought and ſhould be ſupported as far as the law would allow of; but that they could give it no equitable conſtructions, which create abſurdities, as it would apparently be, if they ſhould ſuffer judgment to be entered againſt a dead perſon.

To the ſecond, that it was very true in many caſes, where judgments were entered in the vacation, they ſhould have relation to the firſt day of the preceding term, but that was never the caſe where continuances were entered on record: for, whenever there are continuances entered from time to time, (as in the caſe of a recovery), and judgment is afterwards given, that judgment can have relation no farther backwards than to the time of the laſt continuance or reſt; and, here, the time of the laſt continuance or reſt was the return of the writ of ſummons; for then the demandant imparles, and judgment was not, nor could not be given, till he came again.

To the third, that the death of the vouchee was a collateral matter, not contrary to the record, and, therefore,

therefore, the plaintiff was not eſtopped from aſſigning it for error.——The recovery was therefore reverſed.

Sheepſhanks v. Lucas, 1 Burr. 410.

§ 14. In another caſe, where a writ of error was brought from the Court of Common Pleas, to reverſe a common recovery, and the error aſſigned was, the death of the vouchee before judgment. The defendants pleaded *in nullo eſt erratum*, which confeſſes the error aſſigned to be true. Lord *Manſfield* ſaid it was plain, that judgment could not be given againſt a man after he was dead. That there could have been no judgment againſt the tenant to the *præcipe* in a common recovery, without a judgment over in value againſt the vouchee; they were all entered at the ſame time, and were part of the ſame proceeding. The recovery was unanimouſly reverſed; and it was ſaid, that the caſe of *Wynne* and *Wynne* was an authority in point.

Judgment cannot be given on a Sunday.

§ 15. If a writ of *ſummoneas ad warrantizandum* be returnable on a *Sunday*, and the vouchee dies on that day, the recovery is void, becauſe *Sunday* being *a dies non juridicus*, judgment could not poſſibly have been given until the *Monday* following, conſequently, the judgment muſt have been given after the death of vouchee.

Swann v. Broome, 3 Burr. 1595. 1 Black. Rep. 496. 526.

§ 16. Thus, where a writ of error was brought in the Court of King's Bench from the Court of Common Pleas, to reverſe a common recovery, and the error aſſigned by conſent was, "that the day of the return "of the writ of ſummons was on *Sunday* the 13th of "*May* 1750, on which ſaid 13th of *May*, *Edward*

" *Swann* the vouchee in the common recovery died." Two queſtions aroſe on this caſe. 1ſt, Whether the judgment could relate to the eſſoin-day of the term, or to any day prior to the 13th of *May*, the eſſoin-day of the return. 2dly, Whether, by law, a valid judgment could poſſibly be given on the day of the return, being *Sunday?*

Lord *Mansfield* delivered the reſolution of the court, that the recovery was bad, becauſe no judgment could, in this caſe, be ſuppoſed to be given before the death of the vouchee. That this judgment could not relate to the firſt day of the term, becauſe it could not be given before the return of the writ of ſummons, which appears, by the record, to be in the term. That it could relate only to the eſſoin-day of the writ of ſummons, which was upon *Sunday;* and as the courts do not ſit on a *Sunday*, judgment could not poſſibly have been given until the *Monday*, when the vouchee was dead.

To reverſe this judgment, a writ of error was brought in the Houſe of Lords, and, on behalf of the plaintiff, it was inſiſted, that *Edward Swann* the younger, being alive on the day he was called to appear, and having appeared by his attorney, on the return-day of the writ of ſummons to warranty, to which day the judgment in the Common Pleas muſt neceſſarily relate; muſt be alive when the judgment was given againſt him, and therefore the recovery was good. That this poſition follows from the reaſons and authorities of legal relations of judgment, *viz.* that the term be conſidered in law

6 Brown, Parl. Ca. 333.

law as one day, judgments in general relate to, or, in law, are ſuppoſed to be given, and receive a conſtruction, as if they had been given on the firſt day of the term, and that is the eſſoin-day. But, in particular caſes, where the term, by the proceedings in it, ſuffers a diviſion, as in the preſent caſe by the ſummons to warranty, the judgment relates to the eſſoin-day of that return; on which day, it was admitted by the record, that *Edward Swann* the younger, was alive. It is, however, objected, 1ſt, That the eſſoin-day was *Sunday*, on which day the court never ſits, and ſo cannot be ſuppoſed to have given judgment on that day. 2d, That the court never did ſit on a *Sunday*, nor could it ſit on that day, becauſe forbid by ſeveral canons which were adopted by the common law. To the firſt objection, it was anſwered, that courts formerly commenced all law buſineſs on the eſſoin-days, which were *Sundays* or feſtivals, and ſo might pronounce judgment on thoſe days. The authorities in the books are many and uniform, that the judgments given in term-time all bear relation to that day, whether a feſtival or not; and the reaſon is the ſame where the proceſs is returnable in the middle of the term, before the relation to the eſſoin-day of that return. That the entry, in the preſent caſe, which ſays, *at which day comes here as well the ſaid* Thomas *in his proper perſon, as the ſaid* George *by* John Glaſſe *his attorney; and the ſaid* Edward *being ſummoned*, &c. *likewiſe comes*, &c. *and afterwards departs in contempt of the court*, was alſo an eſtoppel to ſay, that the judgment was not given on that day, or that it was given on any day before, or even after that day. As to the other objection, it was ſaid,

ſaid, that the very canons prohibiting, were evidence of the fact of ſitting on a *Sunday;* and it was further proved by the returns of the writs, all which were formerly on feſtivals; and in the year 1763, nine returns out of ſeventeen were on a *Sunday*, as appears by the almanack of that year. That it would be ſtrange for the king, by his writ, to order the parties to appear on a day on which no court was or could be held, if they were not to ſit on that day. Beſides, the many caſes of teſting and returns of writ, adjourning terms, caſting or warranting eſſoins, *&c.* all which were equally objects of the canon law, prove the fact of courts actually ſitting on *Sundays*. As to the canons, they could only have the ſame force as in other caſes, when adopted, *viz.* to ſubject to ſpiritual cenſures, but not to invalidate the act; like to the canons againſt holding fairs on a *Sunday*, which was alſo prohibited by ſtatute, under temporal penalties; but the contract was binding, till at laſt, by another ſtatute, the contract was made invalid. But as no act extended in words to the preſent ſubject, therefore, it was not againſt the common law for the court to ſit and pronounce judgment on that day; or by conſtruction or intendment of law, the judgment, as given in this caſe, as the entry imported, the court muſt intend that it was given on that day. If the canon law had been adopted, *i. e.* incorporated into our law, and if, in after times, the Legiſlature had thought it neceſſary to forbid judgments having relation to the eſſoin-days, they would then have changed the return of the writs; for it is now neceſſary to take out the writs returnable on the general return-days, and the greateſt part of theſe are *Sundays;*

and as they muſt be conſidered as common days of return, and as the judgments neceſſarily relate to theſe days and no other, if *Sundays* are to be for this purpoſe taken as *dies non juridici*, then moſt of the judgments given in term muſt neceſſarily be bad, as bearing relation to that illegal day; and thus the return-days would remain as ſo many ſnares for error. But it may be preſumed, the Legiſlature did not thus conſider it; and thought the returns and relations of law might ſtill remain, though they knew that the courts, in decency, only ſat on *Mondays*, and that the legal relation to *Sunday* of the judgment given on *Monday*, could be no violation of the *Sabbath*, and would ſtill preſerve private rights. For the profanation of the *Sabbath* was the only object of the Legiſlature; but it never intended to interfere with private rights.

On the other ſide, it was ſaid, that a common recovery, though now become a uſual mode of conveyance, muſt neceſſarily be attended with all the ceremonies and ſolemnities of an actual ſuit at law; and if thoſe are wanting, the conveyance by recovery is as defective, as a will deviſing lands, to which there are only two ſubſcribing witneſſes. That as the recovery purſues the forms of a real action, it is of abſolute neceſſity that the vouchee, againſt whom the judgment is obtained, ſhould be living on the day when ſuch judgment is given by the court, for, otherwiſe, ſuch judgment is erroneous. That though, in all caſes, the judgment ſhall relate as far back as can be permitted by the facts appearing on the record, yet no fictitious relation ſhall preſume what is in itſelf impoſſible. In the

the preſent caſe, the writ of ſummons being returnable on *Sunday* the 13th of *May*, the judgment in the recovery was not, nor could be given till *Monday* the 14th of *May*; for though many nominal return-days of writs were very anciently fixed upon *Sundays*, yet both by law and practice, courts of juſtice cannot now ſit upon a *Sunday*, but the buſineſs appointed for that day is, and always muſt be, diſpatched upon the *Monday* immediately following. As, therefore, the vouchee died upon *Sunday* the 13th, the day preceding the judgment, the judgment was given againſt a perſon not *in eſſe*, and, conſequently, was totally erroneous. That it was not ſufficient to ſay the vouchee had done every act neceſſary to be done by him, that he had executed the deed to make a tenant to the *præcipe*, had acknowledged the warrant of attorney, and had thereby completed, in ſubſtance, every thing requiſite to this particular mode of conveyance; for no warrant would empower an attorney to appear in the name of another, after the death of his principal. The vouchee, it was acknowledged, intended to perfect this conveyance, but died before he could accompliſh it; and whether he died a day or a month too early, was quite immaterial. Every act done by him, might have been done in the month of *September*, previous to a recovery intended to be ſuffered in *Michaelmas* term; and yet it would not be contended, that if ſuch a vouchee had died in *October*, the recovery could have been perfected in the ſubſequent term. It was therefore hoped, that the judgment of the Court of King's Bench, reverſing the judgment in the recovery, would be affirmed.

After hearing counſel on this writ of error, the Judges were directed to deliver their opinions upon the following queſtion, *viz.* " Whether the recovery is " good, or erroneous, the return-day of the writ of " ſummons being on *Sunday* the 13th of *May*, on " which day *Edward Swann* the younger died?" And the Lord Chief Baron of the Court of Exchequer having conferred with the reſt of the Judges preſent, acquainted the Houſe, " that they all agreed in " their opinion, that the recovery was erroneous." Whereupon, it was ordered and adjudged, that the judgment of the Court of King's Bench ſhould be affirmed.

TITLE XXXVI.

ECOVERY.

CHAP. VI.

Of Execution.

§ 1. *Nature of.*
6. *May be ſued againſt the Heir.*
9. *Muſt appear upon Record.*
11. *All the Proceedings in Recoveries may be inrolled.*
13. *Statute* 14 *Geo.* 2. *c.* 20. *ſ.* 4.

Section 1.

Nature of. 1 Inſt. 361 *b.*

AFTER the demandant has obtained judgment in a common recovery againſt the tenant, and the tenant againſt the vouchee, *&c.* the court awards a writ of *habere facias ſeiſinam*, in the ſame manner as upon a judgment in an adverſary action, to the ſheriff of the county in which the lands lie, directing him to put the recoveror in poſſeſſion of the lands which he has recovered; and when this writ is returned, the recovery is complete and executed.

Wilſon 319.

§ 2. The writ of ſeiſin ſhould bear teſte the fourth day incluſive after the return of the writ of entry, or laſt writ of ſummons, when the vouchee comes in by ſummons; and there ſhould be fifteen days between the teſte and the return of the writ of ſeiſin.

Sir W. Jones 10. 1 Wilſ. R. 55. 2 Stra. 1185.

§ 3. A judgment in a common recovery, which is not regularly executed by the return of the writ of

ſeiſin, has no manner of operation; nor does it alter the nature of the eſtate. And as almoſt all recoveries are now ſuffered to uſes, no ſeiſin is in the recoverors, and of conſequence no uſe is raiſed until the execution of the recovery; for until then the land does not paſs.

1 Roll. Ab. 886. 1 Rep. 97 *b.*

§ 4. If a recovery be ſuffered of a rent, common, *&c.* it is ſufficient that the ſheriff deliver ſeiſin upon the land, of the rent, common, *&c.* by parol, for the demandant will thereby acquire the actual poſſeſſion.

1 Rep. 94 *b.* Id.—106. *b.*

§ 5. If a common recovery be ſuffered of lands which are let on leaſes for years, the recoverors have not the reverſion preſently by the judgment, but it muſt be executed by writ, entry, or claim.

May be ſued againſt the Heir.

§ 6. If a perſon ſuffers a common recovery, and dies before it is executed, the recoveror may ſue execution againſt his heirs.

1 Rep. 93.

§ 7. Thus in *Shelley*'s caſe it was unanimouſly reſolved, that although *Edward Shelley* died on the very day on which the recovery paſſed, and conſequently before the writ of *habere facias ſeiſinam* could be awarded, yet that execution might be ſued againſt his heirs.

1 Inſt. 104 *b.*

§ 8. By the ſtatute 7 *Hen.* 8. c. 4. all recoverors in common recoveries are allowed the ſame remedies againſt leſſees for lives and years, by diſtreſs, avowry, and action of debt, for rents and ſervices which become

come due after the recovery, as the perſons againſt whom the recovery was had were intitled to.

§ 9. The awarding of a writ of ſeiſin, its execution and return by the ſheriff muſt appear upon record; and if a writ of execution be not found in a ſpecial verdict, it cannot be preſumed by the court.

Muſt appear upon Record.

§ 10. Thus in ejectment the jury found a ſpecial verdict, that *Henry* the 7th granted the manor of *Witherſlack* to *Thomas* Earl of *Derby*, to hold to him and the heirs male of his body; that *Thomas* Earl of *Derby*, grandſon to the ſaid *Thomas*, ſuffered a recovery of the ſaid manor, and afterwards entered into the ſaid manor, and was ſeiſed thereof; but no writ of execution or entry of the recoverors appeared upon the ſpecial verdict in which this recovery was found; and the Court of King's Bench was of opinion, that as execution was not found, it could not be preſumed, and therefore that the recovery was not good. A writ of error was brought in the Houſe of Lords; and it was argued, that this judgment was erroneous, and that a writ of execution, though not expreſsly found, ought to have been preſumed, for the following reaſons: Firſt, from the exemplification of the recovery itſelf, as found; its antiquity of above 230 years; its being entered upon the rolls; the dignity and quality of the parties to it; and a freſh entry of Earl *Thomas*, expreſsly found to have been made after ſuch recovery. Secondly, from the impoſſibility of any other proof of actual execution, as it was well known, that amongſt the rolls of the recoveries of that and the preceding reigns, the award of the writ of

Witham v. Lewis, 1 Wilſ. Rep. 48. 6 Brown Parl. Ca. 327.

execution is not entered or indorſed upon one in twenty of them, as has been uſual of late years; and upon ſearch in the proper offices where the writs of execution of recoveries ſuffered in thoſe early times ought to be filed, not one of ſuch ancient writs is to be met with. Thirdly, becauſe, had any objection been made at the time of the trial of the recovery, on this account, the court would, and ought to have directed the jury to find the execution of it, from the exemplification itſelf, and the poſſeſſion of the defendant and his anceſtors, agreeable to it.—And if ſo, it is difficult to give a reaſon why the courts of law ſhould not draw the ſame legal concluſions, and make the like legal implication from facts themſelves, which they would direct a jury upon their oaths to do. Fourthly, from the fatal conſequences which might attend this judgment; for if this doctrine ſhould be eſtabliſhed, that the judges ought not to preſume execution at this diſtance of time, it might ſhake the titles of great part of the property of this kingdom, which probably may depend on the validity of ancient recoveries, ſuffered before the ſtatute 34 *Hen.* 8. for if a jury ſhould think proper to inſiſt upon evidence to ſupport ſuch ancient recoveries, which, for the reaſons above, appears impoſſible to be laid before them, as no attaint or other remedy againſt them would lie in ſuch caſe, all property might be ſubjected to an arbitrary and perhaps corrupt determination of a jury, without any redreſs whatever. On the other ſide it was contended, that the judgment of the King's Bench ſhould be affirmed, becauſe it did not appear that any writ of ſeiſin was ever awarded upon the common recovery ſuffered by Earl *Thomas*, or that the

ſame was ever carried into execution by writ of ſeiſin, or otherwiſe; for, until a writ of ſeiſin is awarded, executed and returned, (all which muſt appear upon record, and cannot be preſumed) it is not a perfect recovery, and operates nothing; and no new eſtate is gained to the recoveror, nor any uſe raiſed thereby, nor is the former eſtate altered or changed. And it was ſo determined upon a queſtion on this very recovery, ſo long ago as in the reign of King *James* I.— And, as in the preſent caſe, no new eſtate was gained to the recoveror, no new uſe raiſed, nor the old eſtate changed or altered by this recovery, Earl *Thomas* ſtill continued tenant in tail. After hearing counſel in this cauſe, the following queſtions were propoſed by the Houſe to the Judges: Sir W. Jones 9.

Firſt, Whether ſufficient matter was found in the ſpecial verdict, whereupon the common recovery of 5 *Hen.* 8. can be adjudged or taken to be a complete valid recovery?—And, ſecondly, if not, whether, by law, a *venire facias de novo* ought to be awarded in this caſe? The Lord Chief Juſtice of the Common Pleas delivered the unanimous opinion of the Judges, that there was not ſufficient matter found in the ſaid ſpecial verdict, and that a *venire facias de novo* ought to be awarded. Whereupon the judgment of the King's Bench was affirmed.*

* In a modern caſe Lord *Kenyon* ſays of this determination:— "Lord *Derby*'s caſe has always been conſidered as a ſtrange caſe; "and the Judges of ſucceeding times have been aſtoniſhed that no "application was made to the Court of Common Pleas to rectify "the defect in that recovery according to the uſual practice of "the court." 5 *Term. Rep.* 179.

All the Proceedings in Recoveries may be inrolled.

§ 11. By the ſtatute 23 *Eliz.* c. 3. ſ. 1. it is enacted, that every original writ of entry in the *poſt*, or other writ whereupon any common recovery ſhall be ſuffered, the writs of *ſummoneas ad warrantizandum*, the returns of the ſaid originals and writs of *ſummoneas ad warrantizandum*, and every warrant of attorney, as well of every demandant and tenant, as vouchee, extant and in being, may, upon the requeſt or election of any perſon, be inrolled in rolls of parchment; and that the inrollments of the ſame, or of any part thereof, ſhall be of as good force and validity in law, to all intents and purpoſes, for ſo much of any of them ſo inrolled, as the ſame being extant and remaining, were or ought by law to be.

§ 12. And by the ſecond ſection of this ſtatute it is further enacted, that no common recovery ſhall be reverſed or reverſable for falſe or incongruous Latin, raſure, interlining, miſ-entering of any warrant of attorney, miſ-returning, or not returning of the ſheriff, or other want of form in words, and not in matter or ſubſtance.

Stat. 14 Geo. 2. c. 20. ſ. 4.

§ 13. There are many exemplifications of recoveries ſuffered between the commencement of the reign of Queen *Anne*, and that of *Geo.* 2. whereof no entries upon the rolls in the Treaſury of the Common Pleas, nor any writ of entry, ſummons, or ſeiſin can be found.

Mr. *Pigot* having, in the courſe of his practice, diſcovered repeated inſtances of this neglect, procured the

the following ſtatute to be paſſed, in order to prevent the inconveniencies which might ariſe to purchaſers from an omiſſion of this kind.

§ 14. 14 *Geo.* 2. c. 20. ſ. 4. "Whereas by the de-
" fault or neglect of perſons employed in ſuffering
" common recoveries, it has happened, and may hap-
" pen, that ſuch recoveries are not entered on record,
" whereby purchaſers for a valuable conſideration
" may be defeated of their juſt rights: for remedy
" thereof, be it further enacted by the authority afore-
" ſaid, that where any perſon or perſons hath, or have
" purchaſed, or ſhall purchaſe, for a valuable con-
" ſideration, any eſtate or eſtates, in lands, tenements,
" or hereditaments, whereof a recovery or recoveries
" is, are, or were neceſſary to be ſuffered, in order
" to complete the title, ſuch perſon and perſons, and
" all claiming under him, her, or them, having been
" in poſſeſſion of the purchaſed eſtate, or eſtates,
" from the time of ſuch purchaſe, ſhall and may,
" after the end of twenty years from the time of ſuch
" purchaſe, produce in evidence the deed or deeds,
" making a tenant to the writ or writs of entry, or
" other writs for ſuffering a common recovery or
" common recoveries, and declaring the uſes of a
" recovery or recoveries, and the deed or deeds ſo
" produced (the execution thereof being duly proved)
" ſhall, in all courts of law and equity, be deemed
" and taken as a good and ſufficient evidence for ſuch
" purchaſer and purchaſers, and thoſe claiming under
" him, her, or them, that ſuch recovery or recoveries
" was or were duly ſuffered and perfected, according

" to

" to the purport of ſuch deed or deeds, in caſe no " record can be found of ſuch recovery or recoveries, " or the ſame ſhall appear not to be regularly entered " on record: Provided always, that the perſon or " perſons making ſuch deed or deeds as aforeſaid, " and declaring the uſes of a common recovery, or " recoveries, had a ſufficient eſtate and power to " make a tenant to ſuch writ or writs as aforeſaid, " and to ſuffer ſuch common recovery or recoveries."

TITLE XXXVI.

RECOVERY.

CHAP. VII.

In what Courts and of what Things a Recovery may be ſuffered.

§ 1. *Court of Common Pleas.*
2. *Court of Great Seſſions in Wales.*
3. *Court of Cheſter.*
4. *Courts of the Counties Palatine of Lancaſter and Durham.*
5. *Court of Huſtings in London.*
6. *Of what Things a Recovery may be ſuffered.*
8. *Tithes.*
9. *Advowſons.*
12. *Rents, &c.*
13. *But not of a Fiſhery, &c.*
14. *By what Deſcriptions.*

Section 1.

A Common recovery can in general only be ſuffered in the Court of Common Pleas at *Weſtminſter*, becauſe a real action cannot be commenced in any other court. Court of Common Pleas.

§ 2. By the ſtatute 34 & 35 *Hen.* 8. c. 36. ſ. 40. it is enacted, that common recoveries may be ſuffered at the courts of great ſeſſions in *Wales*, in like manner and form as in the Court of Common Pleas in *England*. Courts of Great Seſſions in Wales.

§ 3. *Cheſter* having been a county palatine ſince the Conqueſt, has always had courts of its own for the cognizance Courts of Cheſter.

cognizance of pleas in all real actions, and conſequently recoveries have been ſuffered in thoſe courts. And by the ſtat. 34 & 35 *Hen.* 8. c. 26. ſ. 6. the Juſtice of *Cheſter* is authorized to hold ſeſſions, twice a year, in the ſhires of *Denbigh*, *Flint*, and *Montgomery*; and by ſ. 42. of this ſtatute it is enacted, that every perſon ſuing writs of entry in the *poſt* for any recovery, ſhall pay ſuch fines for the ſame, as is uſed in the King's Chancery. And by the ſtat. 43 *Eliz.* c. 15. ſ. 4 & 5. it is recited, that the Mayor of the city of *Cheſter* had been time out of mind accuſtomed, in all common recoveries ſuffered before him, to award writs of *dedimus poteſtatem* to receive warrants of attornies from the tenants or vouchees in ſuch recoveries.

Courts of the Counties Palatine of Lancaſter and Durham.

§ 4. Common recoveries may alſo be ſuffered of lands lying in the counties palatine of *Lancaſter* and *Durham*, in the reſpective courts of thoſe counties.

Court of Huſtings in London. Bohun's Priv. Lond. 241. 2 Rep. 57 *b.*

§ 5. By the cuſtom of *London*, common recoveries may be ſuffered upon writs of right, of lands lying within the precincts of the city of *London*, in the court of Huſtings.

Of what Things a Recovery may be ſuffered.

§ 6. A common recovery may be ſuffered of all things whereof a writ of covenant may be brought for the purpoſe of levying a fine, as of an honor, barony, caſtle, meſſuage, curtilage, land, meadow, paſture, underwood, warren, furze, heath, moor, &c. And in general a common recovery may be ſuffered

fered of any thing whereof a writ of entry *ſur diſſeiſin*, or any other writ of entry will lie.

§ 7. A common recovery may be ſuffered of an undivided part, as well as of the whole. And where a perſon ſeiſed of a third part of a manor ſuffered a recovery of a moiety of the manor, it was held good for a third part. Cro. Car. 110.

§ 8. In conſequence of the ſtatute 32 *Hen.* 8. c. 7. ſ. 7. a common recovery may now be ſuffered of every kind of eccleſiaſtical or ſpiritual profits, as of tythes, oblations, portions, penſions, *&c.* Tithes, &c. Tit. 35. c. 6. ſ. 7.

§ 9. It was determined in *Dormer's* caſe, that a common recovery might be ſuffered of an advowſon in groſs, upon a writ of entry. Mr. *Pigott* ſays, that this muſt be underſtood of an advowſon appendant to a manor, but could not be of an advowſon in groſs, ſince the parſon has the freehold, and that therefore it ought not to be by writ of entry *en le poſt*, but by writ of right of advowſon. Advowſons. 2 Mod. 49.

§ 10. A common recovery may, however, be ſuffered of an advowſon in groſs, and a ſmall quantity of land on a writ of entry *ſur diſſeiſin*.

§ 11. Thus, where the validity of a common recovery, which had been ſuffered of an advowſon in groſs, and one acre of land, upon a writ of entry *ſur diſſeiſin*, was queſtioned as to the advowſon: upon ſearching for precedents, ſixteen were found, where recoveries Bayley v. The Univerſity of Oxford. 2 Wilſ. 116.

recoveries of advowſons in groſs, and a little land, had been ſuffered upon writs of entry *ſur diſſeiſin*; and no caſe was found where ſuch a recovery was ever held bad. The court refuſed to hear any argument againſt the recovery, but ſaid, that if this was *res integra*, perhaps it might not be right, yet *quod fieri non debuit factum valet*; and gave judgment that the recovery was good.

Rents, &c. Pigot 97. Vide Turner v. Turner, Brown's Rep. 316.

§ 12. A common recovery may be ſuffered of a rent-charge iſſuing out of lands; but not of an annuity which is only charged on perſonal eſtate.

But not of a Fiſhery, &c. Pigot 96.

§ 13. It is ſaid in *Pigot*, that a common recovery cannot be ſuffered of a fiſhery, common of paſture, eſtovers, ſervices to be done, nor of a quarry, a mine, or market, for they are not in demeſne, but profit only.

By what Deſcriptions.

§ 14. With reſpect to the deſcriptions which are neceſſary to be uſed of thoſe things whereof a recovery is ſuffered, they ſhould be the ſame as in a *præcipe quod reddat* in an adverſary ſuit, but as recoveries have long been conſidered as common aſſurances and conveyances by conſent, great indulgence has been given them by the Judges.

Thinne v. Thinne, 1 Lev. 27.

§ 15. Thus, where a perſon was ſeiſed of a reputed manor only, and ſuffered a common recovery of it by the deſcription of the manor of *A.* it was held good, and in this caſe it was ſaid that where there was an indenture to ſuffer a recovery of a manor and all lands, reputed

reputed parcel thereof; and a recovery was ſuffered of the manor, the lands reputed parcel would paſs, becauſe it appeared by the verdict that it was the intent of the parties that they ſhould paſs: and becauſe the conſtant practice and received opinion ſince Sir *Moyle Finch*'s caſe had been that lands reputed parcel ſhould paſs.

§ 16. A perſon being ſeiſed in tail, among other lands of two marſhes, called *Knightsſwick* and *Southwick*, lying in an iſland called *Camby*, in the pariſh of *Northfleet*, ſuffered a recovery, in which *South Benfleet*, and many other pariſhes were named, and alſo *Camby*, but the pariſh of *North Benfleet* was omitted. And the queſtion was, whether the lands in *North Benfleet* paſſed or not. The court agreed, that the town and pariſh being omitted, though *Camby* was a *lieu connu*, yet being in a town, the recovery did not extend to it. That a recovery in a town, pariſh, or hamlet, is good, and perhaps in a place known out of a town, pariſh, or hamlet, but to admit a recovery of lands in a place known in a town, would be abſurd, for there is no town in which there are not twenty places known. Baker v. Johnſon, Hut. 106.

This caſe was denied to be law by Lord Chief Juſtice *North*, who ſaid that it had been long diſputed whether a fine of lands in *lieu connu* was good, but that in the time of King *James* I. the law was ſettled in that point that it was good, and for the ſame reaſon a recovery would be good, for they were both amicable ſuits, and common aſſurances, and as they grew more 2 Mod. 49.

more in practice, the Judges have extended them farther.

Lever v. Hoſier, 2 Mod. 47. S. C. by the name of Jones v. Wait, 1 Mod. 206.

§ 17. Sir *Samuel Jones* being tenant in tail of lands in *Shrewſbury* and *Cotton*, which were within the liberties of *Shrewſbury*, ſuffered a common recovery of all his lands lying within the liberties of *Shrewſbury*; and the queſtion was, whether the lands in *Cotton*, which was a diſtinct vill, though within the liberties ſhould paſs. It was adjudged, that as the jury had found *Cotton* to be a vill within the liberties of *Shrewſbury*, the lands in *Cotton* ſhould paſs by the recovery.

Addiſon v. Otway, 1 Mod. 250. 2 Vent. 31. Freem. 241.

§ 18. In ejectment a ſpecial verdict was found, that there was a pariſh of *Rippon*, and a vill of *Rippon*, but the latter was not co-extenſive with the former: that a perſon who was tenant in tail of lands in the pariſh, but out of the vill, bargained and ſold all his lands lying in the pariſh of *Ripp n*, with a covenant to levy a fine and ſuffer a recovery to the uſes of the deed: that a common recovery was accordingly ſuffered of one hundred acres of land lying in *Rippon*: that the tenant in tail had no lands in the vill of *Rippon*, and that the intention of the parties was, that all the lands in the pariſh of *Rippon* ſhould paſs. It was argued, that the common law knows no ſuch diviſion of the kingdom as pariſhes, but only the diviſion of vills, and therefore where a place is named in a record, and no more ſaid, it is always intended a vill; conſequently, that the recovery, if it paſſed any lands at all, could only paſs thoſe in the vill. But the Court

were of opinion, that the recovery ſhould extend to the lands in the pariſh of *Rippon*, 1ſt, Becauſe otherwiſe the recovery would be void, it being found that the tenant in tail had no lands in the vill of *Rippon*. 2dly, Becauſe it plainly appeared to be the intention of the parties that this ſhould be intended the pariſh of *Rippon* (not becauſe the jury had found it, for the Judges ſaid, they would pay no attention to that), but becauſe it appeared by the bargain and ſale to be the intention of the parties, that the recovery ſhould extend to all the lands in the pariſh of *Rippon*, and not be confined to the lands in the vill of *Rippon*; for the bargain and ſale and recovery, were to be conſidered as one aſſurance. And although a place ſpoken of ſimply is in law intended a vill, and *ſtabitur preſumptio donec probetur in contrarium*, yet here was ſufficient proof of the intention of the parties.

§ 19. In a writ of error from a judgment on *ſcire facias* in the Court of King's Bench in *Ireland*, brought to reverſe four common recoveries in the Court of Common Pleas there, two of lands in the county of *Limerick*, and two of lands in the city of *Limerick*. Mr. *Buller* for the plaintiff in error objected, that the ſeveral deſcriptions in all the four recoveries were bad. There were fourteen parcels in each recovery, and the principal objections to them were, 1ſt, As to the premiſes in the county, becauſe ſome were demanded, thus, "all thoſe the caſtle, town, and lands of, *&c.* "containing by eſtimation ſo many acres," without ſetting out the quality of the lands; that a recovery could not be ſuffered of a town, and that ſo many

Maſſey v. Rice, Cowper 346.

acres by eſtimation was uncertain. 2d, That others were deſcribed thus, "all that part of the town and "lands, *&c.* now or late in the tenure of *A. B.*" which was vague and uncertain. 3d, That two parcels were deſcribed as "containing a plough land," which was alſo vague and uncertain. In reſpect of the premiſes in the city he objected, that they were all demanded by the deſcription of "meſſuage or tene-"ment," which was uncertain, and alſo as being ſaid to be "now or late in the tenure, *&c.*" he inſiſted that a recovery has no effect until execution, therefore the deſcription of the premiſes ſhould be ſo certain that the ſheriff may know how to execute it, and if bad in ejectment, *a fortiori* in a *præcipe.* Mr. *Alleyne* for the defendant in error, ſaid, he ſhould conſider, 1ſt, What degree of preciſion was required by the regiſter to the deſcription of lands demanded in a *præcipe quòd reddat.* 2dly, What indulgence was to be given to a common recovery, as a conveyance and common aſſurance. 3dly, Whether from the locality of theſe particular lands the deſcriptions were not ſufficient. 1ſt, It was a general rule, that the form of the regiſter muſt be followed; but there were caſes that admitted of a deviation from it. The general principle upon which all forms were founded, and upheld, was, that the defendant might know what he was to defend; and therefore whenever the term uſed, either in reſpect of the quantity or the quality, was ſufficiently certain and notorious to anſwer that purpoſe, it would be good, though not particularly named in the regiſter. 2dly, Great favour was to be ſhewn to common recoveries, becauſe they were now a ſpecies of conveyance and common

1 Rol. Rep. 165.

common aſſurance of land. They were not like the caſes cited, moſt of which were caſes in ejectment, which are adverſary ſuits, and where the objections aroſe in conſequence of ſome eſſential defect which was fatal. But a common recovery was in the nature of an amicable ſuit, which admitted of a greater latitude, and any deſcription that would be good in a deed, would be good in a common recovery. 3dly, With regard to the local ſituation of lands in *Ireland*, it had always been underſtood that the Judges of *Ireland* knew the deſcription of lands in that country better than the Judges here, and therefore credit ought to be given to their knowledge. It was expreſsly held in 2 *Roll. Rep.* 166. 1 *Stra.* 71. & 1 *Burr.* 623. which laſt caſe in principle anſwered all the objections that had been made. Another argument aroſe upon the ſtatutes of Jeofails, which was, that, being after verdict, they were now too late. As to the objections made to the particular deſcriptions of theſe lands, 1ſt, The word "town" in *Ireland* did not mean, as it does here, houſes inhabited, but was merely a technical deſcription of a particular diſtrict, and is notorious there. 2dly, With reſpect to the uncertainty of "ſo many acres by eſtimation," it was ſufficient if the general boundary was known, it was not neceſſary that the preciſe meaſure ſhould be accurately and exactly aſcertained: and as to the term "land" in legal acceptation, it always meant arable. 3dly, The term meſſuage or tenement does not ſtand alone, but is accompanied with other words deſcriptive of its ſituation, which render it ſufficiently certain for the ſheriff to deliver poſſeſſion, beſides it was the ſame

5 Rep. 40. Poph. 22.

deſcription that was uſed in the deed of ſettlement, by which the eſtate was intailed; therefore, even if the deſcriptions were more doubtful, the court would make ſuch a conſtruction as would ſupport them.

2 Mod. 233.

Lord *Mansfield.*—The conſequences of thoſe objections are ſo great; they are ſo void of the leaſt glimmering of reaſon and common ſenſe; and it would be attended with ſuch vaſt inconveniencies to the public in many caſes, without a poſſibility of doing good in any, if in common recoveries, which are a ſpecies of conveyance and common aſſurance, ſuch nice exceptions were to prevail; that the ſtricteſt proof of their being founded in law is neceſſary, to induce the court to overturn a recovery on ſuch grounds. By the ſettled law of the land, men by deeds may fetter their eſtates; but tenant in tail when of age may unfetter them, obſerving a certain form. In this caſe there can be no doubt of the meaning of the tenant in tail, or his power, to unfetter the eſtate. The only queſtion is, whether he has done it agreeable to the proper form; that is, whether he has deſcribed the premiſes with ſufficient certainty. Now the deſcription which he has uſed, is the identical deſcription in the deed which created the fettering; and the objection which is made, is not ſo much that that deſcription is uncertain; as that ſix or ſeven hundred years ago, in an adverſe action, there was a doubt whether ſuch an objection would not have lain: and therefore the defendant would make the ſame objection and raiſe the ſame doubt now. But a common recovery is not an adverſe action. It is ſaid that "all that meſſuage or "tenement

" tenement with the appurtenances, ſituate in the " lane between the two abbey gates, now or late in " occupation of *J. C.* his under-tenants or aſſigns in " the county of the city of *Limerick*," is too vague and uncertain. But one muſt look with a microſcopic eye to diſcover, that a meſſuage or tenement, *&c.* is ſo uncertain a deſcription, as that the ſheriff, or any other perſon, could not know how to find the premiſes by it; and the objection can only be made by a perſon who pores over the ſyllables of the words.

The objections are of two ſorts, and I have no doubt as to either. 1ſt, That the premiſes in the county are demanded thus: " all thoſe the *caſtles*, " *towns*, and *land*, containing by eſtimation, *&c.*" which it is argued is uncertain both in reſpect of quality and quantity. As to that it is admitted, that, " *caſtle*" is a good deſcription in *England*. " *Town*," was determined to be a good deſcription in *Cottingham* v. *King*, 1 *Burr.* 623. and " *land*," means *arable* land. The next objection is, that the premiſes in the city are deſcribed thus: " all that meſſuage or tene- " ment, with a garden or meadow thereto belonging, " ſituate, *&c.* and now or late in the occupation of, " *&c.*" which it has been contended would be a bad deſcription in ejectment. There are many caſes in ejectment which have gone very far indeed; And therefore the doctrine of thoſe caſes ought not to be extended. As to the authority in 3 *Wilſ.* 23. which would have great weight on account of its being ſo recent, the judges in that caſe decided againſt their own private opinion and inclination, becauſe they held

themſelves bound by authority. But there, the words were only *meſſuage or tenement*, without any other deſcription. Here there are other words, "with the "appurtenances and a garden, *&c.*" which ſhew that "meſſuage or tenement" are two words for the ſame thing: and that both mean a dwelling houſe. But this is not any fundamental ground of determination in the preſent caſe. What I ground my opinion upon is, the principles laid down in *Dormer's* caſe, 5 *Co.* 40 *b.* reported alſo in *Popham* 23; and the diſtinction the court there take, between adverſe actions and common recoveries; which at that time were become a common aſſurance, and conveyance of lands, *&c.* and which the court ſay, "being alſo made by *aſſent* "between the parties, ſhall, and always have had a "different expoſition from what is given to a recovery "by *pretence* of title, or to the proceeding in any "other real action to which they are not to be com-"pared; therefore a common recovery may be ſuf-"fered of an advowſon, common in groſs, warren, "and the like, and the intent of the parties ſhall be "obſerved." Now the objection in this caſe is an objection to the very ſame deſcription as is uſed by the anceſtor in the deed which created the entail. The ſole object of the recovery is to unfetter the premiſes ſo entailed; and therefore I will not depart from this anciently eſtabliſhed principle to do ſuch cruel injuſtice, both againſt the intention of the parties, and againſt public convenience. Not one precedent has been cited where ſuch an objection has been held good in the caſe of a common recovery. But a caſe of a fine has been cited where it was allowed, and from thence

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it has been argued by analogy, that it is bad in a common recovery; but that argument does not hold: his Lordſhip then cited the caſe of *Addiſon* v. *Otway*, and ſaid—this deciſion is an inſtance of liberality that would not have been adopted or followed in an adverſe *præcipe*. So in many other inſtances; as an advowſon, for which no adverſe action will lie, but a common recovery will; therefore as the diſtinction between amicable and adverſe ſuits exiſts; as the inconveniencies of avoiding the recovery would be great, as no precedent in point is produced, and there is no poſſibility of doubt about the intent of the parties, I am clearly of opinion, that the judgment of the Court of King's Bench in *Ireland* ought to be affirmed. The other Judges concurred with his Lordſhip, and the judgment was affirmed. Ante.

TITLE XXXVI.

RECOVERY.

CHAP. VIII.

Of the Parties to a Recovery.

§ 1. *Who may ſuffer a Recovery.*
2. *Married Women.*
3. *Aliens.*
4. *Who are diſabled from ſuffering Recoveries.*
5. *The King.*
6. *Infants.*
17. *Idiots, Lunaticks, &c.*
§ 19. *Tenants for Life.*
22. *Women ſeiſed of Dower or Jointures.*
48. *Huſbands ſeiſed* jure uxoris.
55. *Eccleſiaſtics ſeiſed* jure eccleſiæ.

Section 1.

Who may ſuffer a Recovery.

A COMMON recovery having, from its origin, been conſidered as a common aſſurance, or conveyance, by which lands were transferred from one perſon to another, and the default and admiſſion of judgment by the tenant and vouchee being as much their voluntary act as if they had conveyed the land by feoffment and livery, or any other act in *pais*; it was determined, that all thoſe whom the law enables, in other inſtances, to diſpoſe of their property, and who are of full age and ſufficient underſtanding, ſhould have power to ſuffer a common recovery.

Married Women. 2 Rep. 74. 78. 10 Rep. 43. Plow. 504.

§ 2. A married woman may join her huſband in ſuffering a common recovery, which will bind her as fully

fully as a fine, and for the ſame reaſon. And whenever a huſband and wife appear in the Court of Common Pleas to ſuffer a common recovery, the wife is always privately examined as to her conſent. And where a warrant of attorney is acknowledged before commiſſioners appointed by writ of *dedimus poteſtatem de attornato faciendo* by a huſband and wife, the commiſſioners are poſitively directed, by a rule of court, to examine the wife ſeparately and apart from her huſband as to her free and voluntary conſent to the ſuffer-ſuch recovery.

Ante c. 4. f. 12.

§ 3. An alien may ſuffer a common recovery, for he is a good tenant to the *præcipe* until office found.

Aliens. 4 Leon. 84.

§ 4. In enumerating the perſons who are diſabled from ſuffering a common recovery, I ſhall begin with thoſe whoſe diſability ariſes from the rules of the common law; and then proceed to thoſe whoſe diſabilities are created by particular acts of parliament.

Who are diſabled from ſuffering Recoveries.

§ 5. The king cannot ſuffer a common recovery, for, if he does, he muſt either be tenant or vouchee; and, in both caſes, the demandant muſt count againſt him, which the law does not allow.

The King. Pigot 74. Plowd. 244. Cro. Car. 96.

§ 6. Infants are not capable of ſuffering common recoveries, on account of their want of underſtanding; although, if an infant is permitted to ſuffer a common recovery in perſon, he muſt, as in the caſe of a fine, and for the ſame reaſon, reverſe it during his

Infants. 1 Inſt. 380 *b*. 2 Inſt 484. Dyer 232 *b*.

infancy, which muſt be tried by inſpection of the judges; otherwiſe the recovery will bind him for ever afterwards.

Hopton v. Johns, Cro. Eliz. 323. Ailet v. Walker, 2 Roll. Ab. 395.

§ 7. There are, however, two caſes, in which it appears to have been determined, that a common recovery ſuffered by an infant who appeared in perſon, might be reverſed. But, I preſume, that theſe recoveries were avoided during the infancy of the vouchees; for the principle, that a recovery ſuffered by an infant is ſo far ſimilar to a fine, that it cannot be reverſed after the infant comes of age, is moſt clearly ſtated by Lord *Coke* in the places above cited, and recognized in a caſe ſubſequent to thoſe laſt mentioned; in which, it was reſolved, that where an infant ſuffered a recovery and appeared in perſon, a writ of error did not lie after he attained his full age; and, it is ſaid, that the court delivered this opinion after conference with the other Judges, it being a matter of great concern.

Raby v. Robinſon, 1 Sid. 321.

Ch. 4. ſ. 9.

§ 8. But, if an infant ſuffers a common recovery, in which he appears by attorney, he may reverſe it at any time after he attains his full age, as it may be tried by a jury, whether he was an infant or not when he appointed an attorney.

Stokes v. Oliver, 5 Mod. 209.

§ 9. Thus, where a writ of error was brought to reverſe a common recovery, and the error aſſigned was, that one of the vouchees was a feme covert, and under age, and that ſhe appeared by attorney. It was determined, that the recovery ſhould be reverſed, although the woman had attained her full age, becauſe

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it might be tried by a jury, whether the warrant of attorney was made by a perſon under age or not.

§ 10. It was formerly doubted, whether a common recovery bound an infant who appeared by his guardian; and the practice, therefore, was, when an infant intended to ſuffer a common recovery, that he and his guardian ſhould petition the king to grant letters under the privy ſeal to the Judges of the Court of Common Pleas, directing them to permit ſuch infant to ſuffer a common recovery. But it was ſtill in the diſcretion of the Judges to permit the infant to ſuffer it, or not, according to the circumſtances of his caſe; and if the Judges, upon examination, found it neceſſary, or that it would be advantageous to the infant that he ſhould ſuffer a common recovery, they then admitted perſons of known integrity and fortune to appear as guardians to the infant, and to ſuffer a recovery for him in court.

10 Rep. 43. Cro. Eliz. 471. Godb. 161.

§ 11. The Earl of *Devon* deviſed his eſtates to his ſon the Earl of *Newport*, who was then an infant of the age of eighteen; and among the poſſeſſions of the ſaid Earl was the manor of *Wanſted*, which he left to his ſon in tail, with ſeveral remainders over. The Earl of *Devon* was greatly in debt, and had appointed certain honourable perſons to be guardians of his ſon, who found it neceſſary to ſell the ſaid manor of *Wanſted* for payment of the Earl's debts. They therefore petitioned the king that he would write to the judges of the Common Pleas, that a common recovery ſhould be ſuffered of this manor, which his majeſty did. And

Blount's Caſe. Hob. 196. Jenk. Cent. 299. Sir H. Mackworth's Caſe, 1 Vern. 461. S. P. Cro. Car. 307. Heſket v. Lee, 1 Mod. 48. 2 Saund. 94.

upon examination of the infant privately, and of his guardians in court, and of the circumſtances of the caſe, a common recovery was accordingly ſuffered, in which the Earl of *Newport* and his guardians were vouched in perſon.

1 Ld. Raym. 113.

§ 12. The judges of the Court of Common Pleas may, however, refuſe to permit ſuch a recovery, if the reaſons for an application of this kind do not appear to them ſufficient.

Sir J. St. Alban's Caſe, Salk. 567.

§ 13. Sir *John S. Alban*'s, being of the age of nineteen, his ſiſter, who was next in remainder to him, and alſo his heir at law, married one of his footmen. He petitioned the king for leave to ſuffer a common recovery, who referred it to the judges of the Common Pleas, before whom ſeveral precedents of recoveries, ſuffered by infants upon privy ſeals, were cited. The judges obſerved, that ſeven of the petitions were by fathers upon the marriage of their ſons, and an equal recompence given, whereas here was neither father nor marriage in the caſe. They ſaid, this caſe had been carried too far already, and, therefore, would not allow it.

Common recoveries ſuffered by privy ſeal are now diſuſed, and private acts of parliament are univerſally ſubſtituted in their ſtead.

Perk. 12. 3 Burr. 1804.

§ 14. If an infant is permitted to ſuffer a common recovery, he muſt make a tenant to the *præcipe* by feoffment, and give livery of ſeiſin in perſon, by which means, the feoffment is only voidable; whereas, if the infant

infant appointed an attorney to give livery of ſeiſin for him, the feoffment would then be abſolutely void.

§ 15. An infant truſtee may join in a common recovery, in conſequence of the ſtatute 7 *Ann*, c. 19. if he is directed to do ſo by the Court of Chancery. Tit. 35. ch. 5. f. 30.

§ 16. Thus, where a perſon who was a truſtee, deviſed all his eſtates to his ſon, who was then an infant, in tail, with remainders over. A petition was preferred, that the infant to whom the truſt eſtate was deviſed, might be ordered to convey by recovery, purſuant to the ſtatute 7 *Ann*, c. 19. Lord *Hardwicke*, at firſt, thought there muſt be an application for a privy ſeal, but the act being general, "that the infant "ſhall convey lands, as the court, by order, ſhall "direct;" his lordſhip made an order, that the infant ſhould convey by a common recovery. Ex parte Johnſon, 3 Atk. 559.

§ 17. Idiots, lunaticks, and, generally, all perſons of non-ſane memory, are diſabled from ſuffering common recoveries, as well as from levying fines; though, if an ideot or lunatic does ſuffer a common recovery, and appears in perſon, no averment can afterwards be made that he was an idiot or lunatic. But if he appears by attorney, I preſume ſuch an averment would be admitted, upon the ſame principle that an averment of infancy may be made againſt a warrant of attorney, acknowledged by an infant for the purpoſe of ſuffering a common recovery, as the fact of idiocy may be tried by a jury, with as much propriety, as the fact of infancy. Idiots, Lunatics, &c. Vide infra.

§ 18. Although

Sir B. Wentworth's Caſe, infra.

§ 18. Although no averment of idiocy or lunacy can be made againſt a recovery, where the parties appear in perſon, yet evidence of weakneſs of underſtanding has been admitted, to invalidate a deed to make a tenant to the *præcipe*, for ſuffering a common recovery; and the recovery has, in that manner, been ſet aſide.

Tenants for Life. Pigot 18.

§ 19. By the common law, if a *præcipe* had been brought againſt a tenant for life, and a recovery ſuffered, it would have barred the perſons in remainder; but this being juſtly conſidered as a grievance, it was enacted by the ſtatute 32 *Hen.* 8. c. 31. that all common recoveries ſuffered by tenants for life, without the conſent of the perſons in remainder or reverſion, ſhould be totally void.

Pigot 83.

§ 20. If, after this act, a tenant for life had made a leaſe for years, and the leſſee had made a feoffment, and a *præcipe* had been brought againſt the feoffee, and he had vouched the tenant for life, ſuch a recovery was not within the ſtatute, becauſe the tenant for life was not then ſeiſed of the eſtate for life. To remedy this, the ſtatute 14 *Eliz.* c. 8. was paſſed, reciting, that ſeveral tenants in tail after poſſibility, and other tenants for life or lives, had ſuffered common recoveries, to the prejudice of thoſe in remainder or reverſion; it was therefore enacted, "that all ſuch recoveries had "or proſecuted by covin againſt any ſuch particular "tenant, or againſt any other, with voucher over of "ſuch particular tenant, ſhould, as againſt all perſons "in remainder or reverſion, be utterly void, and of no "effect:

" effect: provided that that act ſhould not extend to " recoveries by good title, or to recoveries by aſſent " and agreement of the perſons in remainder or re- " verſion, ſo that ſuch aſſent appeared of record in " any of her majeſty's courts. And it was thereby " further enacted, that the ſtatute 32 *Hen.* 8. ſhould " be repealed."

§ 21. In conſequence of the laſt proviſo in this ſtatute, a tenant for life may join with the perſons in remainder or reverſion in ſuffering a common recovery, without incurring a forfeiture.

Wiſeman v. Crow, Cro. Eliz. 562.

§ 22. Before the ſtatute of uſes, a conſiderable part of the landed property of the kingdom was in the hands of feoffees to uſes, by which means, women were frequently defrauded of their dower, a woman not being dowable of an uſe; ſo that it became uſual on every marriage, for the friends of the wife to make the intended huſband procure a conveyance of the legal eſtate from his feoffees to himſelf, and his intended wife for life, or in tail, in which latter caſe, the wife uſed ſometimes to alienate the eſtate after her huſband's death, by fine or recovery, and ſo give it away from her iſſue and her huſband's family.

Women ſeiſed of Dower or Jointures.

Tit. 7. c. 1.

To prevent this practice, a ſtatute was paſſed 11 *Hen.* 7. c. 20. by which it was enacted, " that any " woman who had any eſtate in dower, or for term of " her life, or in tail, jointly with her huſband, or only " to herſelf, or to her uſe in any manors, &c. the in- " heritance or purchaſe of her huſband, or given to " the

" the ſaid huſband and wife in tail, or for term of life,
" by any of the anceſtors of the ſaid huſband, or by
" any other perſon ſeiſed to the uſe of the ſaid huſ-
" band or of his anceſtors, and ſhould hereafter, be-
" ing ſole, or with any after-taken huſband, diſcontinue,
" alien, releaſe, or confirm with warranty, or by covin
" ſuffer any recovery of the ſame, that all ſuch reco-
" veries, diſcontinuances, *&c.* ſhould be utterly void
" and of no effect, and it ſhould be lawful for the
" perſon in remainder or reverſion to enter imme-
" diately: provided alſo, that this act extend not to
" any ſuch recovery or diſcontinuance to be had where
" the heirs next inheritable to the ſaid woman, or he
" or they that next after the death of the ſame wo-
" man ſhould have eſtate of inheritance in the ſame
" manors, lands, or tenements, be aſſenting or agree-
" able to the ſaid recoveries, where the ſame aſſent
" and agreement is of record or inrolled."

This act is confirmed by the ſtatute 32 *Hen.* 8. c. 36. ſ. 2. which provides, that no fine levied by any woman of any ſuch eſtate as is mentioned in the ſtatute 11 *Hen.* 7. ſhall be of any effect.

§ 23. Theſe ſtatutes having been made to prevent an injury, have always been conſtrued liberally; and, therefore, every kind of eſtate created by the fine of a jointreſs, is held to be void againſt the heir.

Pigot v. Palmer, Moor 250. 3 Rep. 51 *b.*

§ 24. Thus, where a tenant in tail, who was a jointreſs within this ſtatute, accepted a fine *ſur cognizance de droit come ceo* from a ſtranger, who granted and rendered

rendered the lands to the jointreſs for 100 years, it was adjudged, that this was a forfeiture, for, otherwiſe, the intention of the ſtatute might, by practices of this kind, be entirely defeated. Jenk. Cent. 6. c 97. 2 Leon. 168. 3—78.

§ 25. With reſpect to the eſtates which have been deemed to be comprehended in this act, the ſame liberality of conſtruction has been adopted, and, therefore, it has been determined, that whenever an eſtate has been derived, either from the huſband himſelf, or from any of his anceſtors, it is protected by this ſtatute.

§ 26. Thus, where the anceſtor of the huſband made a feoffment in fee, upon condition that the feoffees ſhould reconvey to the huſband and wife in tail, this was adjudged to be ſuch an eſtate as is intended by the ſtatute. Anon. Mo. 93. pl. 231. 3 Rep. 50 *b*. Cro. Eliz. 513. S. P.

§ 27. So, where a man and a woman, being joint-tenants in fee of a manor, intermarried, and aftewards levied a fine thereof to a ſtranger, who rendered it to them in tail. After the death of the huſband, the wife married again, and joined her ſecond huſband in levying a fine. It was held that this fine was void, as to the moiety which had originally been the eſtate of the huſband, becauſe it was protected by this ſtatute. Laughter v. Humphrey, Cro. Eliz. 524.

§ 28. In the ſame manner, where one brother, in conſideration of a marriage had between his brother and *M.*, covenanted to ſtand ſeiſed to the uſe of himſelf for life, and, after, to the uſe of his brother and his wife for their lives. This was adjudged to be a Sharrington v. Strotton. Plowd. 300.

jointure within the ſtatute 11 *Hen.* 7. as moving from the anceſtor of the huſband.

§ 29. Although lands are ſettled in conſideration of money given by the wife or her friends, yet if the marriage appears to have alſo conſtituted a part of the conſideration, the eſtate will be within this ſtatute.

Villars v. Beaumont, Dyer 186 *a.* Bendl. 29. Keilw. 208 *a.* Mo. 93. p. 231. Vide infra. Kirkman v. Thompſon, S. P.

§ 30. Thus, where a grandfather bargained and ſold lands to *J. N.* for thirty years, remainder to himſelf and his wife for life, remainder to his ſon for life, remainder to his grandſon, and one *S.* the daughter of *J. N.* and the heirs of their two bodies begotten; after which followed theſe words: "for the which manor, bargain, and other "the premiſes, the ſaid *J. N.* covenants to pay the "ſaid ſum of 70 *l.* at certain days, *&c.*" the ſon afterwards married *S.* who ſurvived him, and with a ſecond huſband levied a fine of thoſe lands. The jury further found *dehors* the indenture, that the indenture and bargain and ſale were as well in conſideration of the marriage as of the money: it was held by three judges againſt *Dyer*, that the fine was void, for they expounded the words, "given by the anceſtors, *&c.*" to be any lands aſſured to the woman in jointure, either for money (as few marriages are made without it) or elſe freely.

Vide Coplard v. Platt. Sir W. Jones 254. Cro. Car. 244. Jenk. 310. p. 20.

2 Vern. 489. 1 Ab. Eq. 220.

§ 31. A truſt eſtate, or an equity of redemption, is within this ſtatute, as well as a legal eſtate, for uſes are expreſsly mentioned in the ſtatute, and a truſt is now, what an uſe was then.

§ 32. With

§ 32. With reſpect to the eſtates which are not comprehended within this ſtatute, as the object of it was only to prevent women from alienating thoſe lands which were ſettled on them by their huſbands, it therefore does not extend to any lands which were originally the property of the wife, or which were derived from any of her anceſtors.

§ 33. Thus, where huſband and wife ſeiſed of lands in right of the wife, levied a fine *ſur cognizance de droit come ceo*, and took back an eſtate to the huſband and wife in tail general, remainder to the heirs of the wife. The huſband died, leaving iſſue a ſon, the wife married a ſecond huſband, with whom ſhe joined in levying another fine, on which the ſon by the firſt huſband entered for a forfeiture by the 11 *Hen.* 7. It was determined, that the laſt fine was no forfeiture by this ſtatute; for as the eſtate was originally the property of the wife, it would be unreaſonable to reſtrain her from diſpoſing of it, and quite foreign to the intent of the act; for although it might, within the letter of the act be conſidered as the purchaſe of the firſt huſband by the firſt fine, yet it was not ſo in reality, as the lands were originally derived from the wife. Eyſton v. Studd. Plowd. 463. 1 Inſt. 366 *a*.

§ 34. Huſband and wife ſold lands which were the eſtate of the wife, and purchaſed other lands with the money, which were ſettled on the huſband and wife in tail. This was agreed *arguendo*, to be a jointure within the ſtatute, becauſe the money was a chattel veſted in the huſband, which he might have diſpoſed Palmer 217.

of as he pleaſed, and therefore when he laid it out in the purchaſe of lands, the law will conſider them as purchaſed by the huſband.

§ 35. A voluntary gift by a ſtranger to a huſband and wife, is not within this ſtatute.

Ward v. Walthew, Cro. Jac. 173. 1 Brownl. 137. Yelv. 101.

§ 36. The biſhop of *Exeter* made a voluntary gift of lands to one *Turner* his ſervant, and *Sybill* his wife, and to the heirs of their two bodies. The huſband died, and the wife levied a fine of thoſe lands: it was reſolved that this was not a jointure within the ſtatute 11 *Hen.* 7. for the lands did not come from the huſband, nor from any of his anceſtors.

§ 37. If lands are limited by a huſband, or by any of his anceſtors, to the wife in tail general, without any limitation to the iſſue or heirs of the huſband, ſuch an eſtate is not protected by the ſtatute 11 *Hen.* 7. becauſe the object of that ſtatute was to prevent wives from prejudicing the iſſue or heirs of their former huſbands; but where no remainder is limited to ſuch perſons, no prejudice can be done them.

Foſter v. Pitfal. Cro. Eliz 2. Idem. 524. 1 Leon. 261. Com. Rep. 369. Hughes v. Clubb, S. P.

§ 38. Thus, where a man ſeiſed in fee deviſed lands to his wife in tail general, remainder over to a ſtranger; after the huſband's death, the wife married a ſecond time, and ſuffered a recovery. The daughter of the firſt huſband entered for the forfeiture, but it was determined, that although this caſe was within the letter of the ſtatute, yet it was not within the intention

tention of it, the remainder being limited from the heirs of the huſband to a ſtranger.

A jointure limited to a woman in fee is not within this ſtatute for the ſame reaſon. 4 Rep. 3 *b.*

§ 39. Copyhold eſtates are not comprehended within this ſtatute, for an entry being given to the heir of the huſband, he would thereby become tenant without being admitted by the lord. Beſides, a copyhold eſtate is not within the words or intention of the ſtatute, for it cannot be diſcontinued or conveyed in any other manner than by ſurrender. Gilb. Ten. 181. Harrington v. Smith. 2 Sid. 41. 73. 4 Mod. 45.

§ 40. This ſtatute was originally conſtrued to extend to a fine levied both by the huſband and wife.

§ 41. Thus, where a man ſeiſed of lands in fee, levied a fine to the uſe of himſelf for life, remainder to the uſe of his wife, and the heirs male of her body, begotten by him, for her jointure. Afterwards the huſband and wife levied a fine, and ſuffered a common recovery of thoſe lands, and died leaving iſſue, who entered by force of the ſtatute 11 *Hen.* 7. and the entry was held lawful; although, as Lord *Coke* obſerves, this caſe was out of the letter of the ſtatute, for the wife neither levied the fine when ſole, nor with any after-taken huſband, but being within the miſchief, it was adjudged to be within the remedy of the ſtatute, the intention of which was to prevent children, 1 Inſt. 365 *b.*

who were provided for by ſuch jointures, from being diſinherited.

§ 42. The doctrine eſtabliſhed in this caſe has however been contradicted by a more modern determination.

Kirkman v. Thompſon, Cro. Jac. 474. Pigot. Recoy. 81.

§ 43. A father, in conſideration of the marriage of his ſon, and of 200 *l.* portion, covenanted to convey lands to the uſe of the ſon and his wife, and of the heirs of the body of the wife, remainder to his own right heirs. A conveyance was made accordingly, and the huſband and wife joined in levying a fine of the lands. It was reſolved, firſt, that this was a jointure within the intent of the ſtature, although part of the conſideration was money paid by the father of the wife to the father of the huſband. 2dly, That the fine did not operate as a forfeiture, either within the words or intention of the ſtatute, for the wife was not ſole, nor was the alienation with an after-taken huſband, and the object of the ſtatute was only to provide againſt the diſheriſon of the heirs of the huſband contrary to his intention.

Simpſon v. Turner, 1 Ab. Eq. 220.

Doct. & Stud. Dial. 1. c 31. Lincoln. Col. Caſe. 3 Rep. 58.

§ 44. By the 8th and 9th ſections of this ſtatute it is provided, that it ſhall not extend to any recovery to be had with the heirs next inheritable to the woman, or where the perſon next in remainder conſents to the ſame, provided ſuch conſent appears upon record.

§ 45. Lord

§ 45. Lord *Coke* ſays, that if a man makes a feoffment to the uſe of himſelf and his wife in tail, remainder to the uſe of the huſband in fee, and has iſſue a daughter, and dies leaving his wife enſient of a ſon, whereby the reverſion in fee deſcends to the daughter; if the wife and daughter, before the birth of the ſon, join in levying a fine, or ſuffering a common recovery, the ſon may enter and take the benefit of this ſtatute. 3 Rep. 61 *b.*

§ 46. The right of entry which is given by the ſtatute 11 *Hen.* 7. is not confined to the heir of the huſband, but is extended to the perſon to whom the inheritance is to go after the deceaſe of the woman, whether he be the heir of the huſband, or a ſtranger deriving under the heir of the huſband.

§ 47. Thus, where Sir *Richard Bridges* made a feoffment of lands to truſtees, on condition that they ſhould give back the ſame to him and his wife, and to the heirs of their two bodies begotten, remainder to the right heirs of Sir *Richard*, which was accordingly done. Sir *Richard* had iſſue by his wife a ſon, named *Anthony*, and died. *Anthony*, in the lifetime of his mother, conveyed the lands by fine to Sir *G. Brown* in fee; the wife afterwards made a leaſe for three lives, not warranted by the ſtatute 32 *Hen.* 8. whereupon Sir *G. Brown* entered; and the queſtion was, whether his entry was lawful within the ſtatute 11 *Hen*, 7.? It was reſolved, that the entry of Sir *G. Brown* was lawful, becauſe he was the perſon who Sir G. Brown's Caſe, 3 Rep. 50. Lynch v. Spencer, S.C. Cro. El. 513.

had the immediate right to the inheritance after the death of the wife.

Huſband ſeiſed jure uxoris.

§ 48. By the common law, if a huſband, ſeiſed of lands in right of his wife, had levied a fine of them without her concurrence, it operated as a diſcontinuance, by which means, the wife was barred of her entry after the death of her huſband, and was obliged to bring her writ of *cui in vita;* and, therefore, *Littleton* obſerves, that the judges would not permit a man to levy a fine alone of his wife's eſtate.

Lit. ſ. 594. 731. 1 Inſt. 326 *a.*

This produced the ſtatute 32 *Hen.* 8. c. 28. ſ. 6. by which it is enacted, "That no fine, feoffment, *&c.* "by the huſband only of any manors, being the inhe- "ritance or freehold of his wife, during the coverture "between them, ſhall in anywiſe be, or make a diſ- "continuance thereof, or be prejudicial or hurtful to "the ſaid wife, or her heirs, but that the ſame wife, "or her heirs, ſhall lawfully enter into ſuch manors, "*&c.* any ſuch fines, feoffments, *&c.* to the con- "trary notwithſtanding; fines levied by the huſband "and wife, whereunto the ſaid wife is a party and "privy, only excepted."

1 Inſt. 326 *a.* 2 Init. 681. 8 Rep 71. Greneley's Caſe.

§ 49. This act having been made to ſuppreſs a wrong, and to give the injured party a more ſpeedy remedy than what the common law afforded, it has been conſtrued liberally; ſo that, where lands were given to a huſband and wife, and the heirs of their two bodies, and the huſband alone levied a fine thereof and

and died, the entry of the wife was adjudged to be lawful, although the words of the act are, "being "the inheritance of freehold of the wife;" whereas, in this case, the lands were as well the inheritance and freehold of the husband as of the wife.

§ 50. Where husband and wife are joint-purchasers in tail, remainder to the wife in fee, and the husband alone levies a fine and dies, this is an alienation within the statute. Dyer 168, p. 48.

§ 51. If the husband alone makes a feoffment of his wife's land, and, afterwards, he and his wife are divorced *causa præcontractus*, yet the wife may enter after the death of her husband, for it is sufficient that she was his wife *de facto* at the time of the alienation. 1 Inst. 326 a.

§ 52. Although the king be not named in this act, yet he is bound by it as well as a subject; so that, if a husband alone levies a fine of his wife's land to the king, still the wife may enter after the death of her husband. 1 Inst. 681. Beaumont's Case.

§ 53. If the wife dies before entry, her issue may enter; and if she has no issue, then the person in remainder or reversion may enter by the very words of the statute. 1 Inst. 326 a.

§ 54. This statute does not extend to copyholds, for the words of it only allude to estates which pass by Moore 596.

by common law conveyances; and if it were conſtrued to comprehend copyholds, the heir of the wife would become tenant without being admitted by the lord.

Eccleſiaſtics ſeiſed jure eccleſiæ.

§ 55. Eccleſiaſtics ſeiſed in right of their churches, are prohibited from ſuffering common recoveries, upon the ſame principle that they are prohibited from levying fines.

TITLE

TITLE XXXVI.

RECOVERY.

CHAP. IX.

Of the Amendment of Recoveries.

§ 2. *Writ of Entry.*
3. *Names of the Parties.*
9. *Deſcription of the Eſtates.*
§ 18. *Exceptions.*
24. *There muſt be ſomething to amend by.*

Section 1.

COMMON recoveries being judicial proceedings, muſt be carried on according to the eſtabliſhed forms and ſolemnities of a ſuit at law; but, however, as they are ſuffered with the conſent of all the parties, and conſidered as common aſſurances, they have always been conſtrued in the moſt favourable manner, and, therefore, the Court of Common Pleas has, in many inſtances, allowed them to be amended.

Writ of Entry.

§ 2. A miſtake in the writ of entry, on which a recovery was ſuffered, was allowed to be amended, by inſerting fifty acres inſtead of thirty. Lord Chief Juſtice *Eyre* doubted whether the Court had a power to do it, in conſequence of the determination in Lord *Pembroke*'s caſe. But Mr. Juſtice *Rooke* obſerved, that by the ſtatute 8 *Hen.* 6. c. 12. original writs might be amended, as to miſtakes of the clerks.

Croſs and Grey, 1 Boſ. and Pull. 137.

Tit. 35. ch. 7. ſ. 3.

Henzell v. Lodge, infra.

§ 3. Where

Names of the Parties.

§ 3. Where an evident miſtake has been made in the names or deſcriptions of the parties, the court has allowed it to be amended.

Chapman v. Bacon, Pigot 170.

§ 4. A common recovery was agreed to be ſuffered, wherein *John Chapman* and *Richard Elton* were to be demandants, and, by the miſtake of a clerk, the writ of entry was ſued out in the name of *John Chapman* and *John Elton;* the recovery was allowed to be amended.

Pigot 170.

§ 5. A warrant of attorney was given, in order to ſuffer a common recovery, by *William Reynolds* and *Heſter* his wife; the ſerjeant who took the warrant of attorney, certified the ſame to be given by *William Reynolds* and *Margaret* his wife, and the *mittimus* and tranſcript were made of a warrant given by *Margaret,* and the recovery was entered accordingly, but it was allowed to be amended.

Thurban v. Pantry, Pigot 171.

§ 6. A common recovery was ſuffered by *R. Callow* and *Ux'*, without mentioning the name of the wife, and it was allowed to be amended.

Mayre v. Coulthard, 2 Black. R. 1230.

§ 7. A recovery was allowed to be amended, by changing the words *Ann* the wife of *Henry Goodwin* to *Elizabeth,* in conformity to a fine and deed to lead the uſes.

Lord and Biſcoe, Barnes 24.

§ 8. A rule was made abſolute to amend a recovery, by tranſpoſing the names of the demandant and tenant purſuant

purſuant to the deed, making a tenant to the *præcipe* by the recovery. *Biſcoe* had been demandant, and *Lord* tenant; by the deed, *Lord* was to be demandant, and *Biſcoe* tenant.

§ 9. In the ſame manner, where a miſtake had been made in the deſcription of the eſtates intended to be comprehended in a recovery, it has been allowed to be amended. Deſcription of the Eſtates.

§ 10. A common recovery was agreed to be ſuffered of lands in *Alphampton* and *Magna Hermney*, in the county of *Eſſex;* but, by miſtake, the ſame was ſuffered of lands in *Alphampton* and *Lamarſh*, and it was ordered to be amended. Skinner v. Laud, Pigot 171.

§ 11. A common recovery was agreed to be ſuffered of lands in *New Church*, *Levington*, and *Merſham*, but *New Church* was totally omitted. Upon examining the deed to lead the uſes, it was ordered to be amended. Whitwell v. Maſters, Pigot 172.

§ 12. A common recovery was agreed to be ſuffered of two meſſuages and one garden in *London*, but being only ſuffered of one meſſuage, it was allowed to be amended. Brooke v. Biddolph, Pigot 172.

§ 13. The *præcipe* and writ of entry in a common recovery were allowed to be amended, by adding the names of ſeveral pariſhes which had been omitted. Jenkinſon v. Staples, Pract. Reg. C. P.

§ 14. The

Henzell v. Lodge, 2 Black. R. 747. 3 Wilf. R. 154. Wheeler v. Heſeltine, 2 Boſ. & Pul. 560.

§ 14. The deed to lead the uſes of a recovery, mentioned "all the vouchee's lands in *Aldenham*, or elſe-"where, in the county of *Kent*, in the occupation of "*Robert Goddard*." *Robert Goddard* rented one entire farm of the vouchee (all ſworn to be intended to paſs by the recovery), being principally in the pariſh of *Aldenham*, but part thereof lay in the pariſh of *Merſham*, which was not known to the parties when the recovery was ſuffered. The court, after taking a day to conſider of it, allowed the recovery to be amended, by inſerting the word *Merſham*.

Milbank v. Joliffe, Id 580.

Watſon v. Cox, 2 Black. R. 1065.

§ 15. On a motion to amend a recovery of lands, *&c.* in the town of *Kingſton-upon-Hull*, by inſerting the words *in Myton*, and the words *and county*, thereby making the deſcription of the lands to be "in *Myton*, "in the town and county of *Kingſton-upon-Hull*." The deed to lead the uſes deſcribed the parcels to be ſituate "in the lordſhip of *Myton*, in the county of "*York*, or in the town and county of *Hull*, lately "purchaſed of *Thomas Yates*." And it was proved by affidavit, that one *William Crowle* purchaſed of *Thomas Yates* the lands intended to paſs, being in the townſhip of *Myton*, in the town and county of *Kingſton-upon-Hull*, and, in 1728, ſettled them ſucceſſively on *George* and *Richard Crowle* in tail: that *George* died without iſſue, and *Richard* being then tenant in tail, and having no other lands in *Kingſton-upon-Hull*, did, in 1754, ſuffer this recovery. The court directed notice to be given to the tenant, and, on his conſenting, made the rule abſolute.

§ 16. A re-

§ 16. A recovery, which had been ſuffered nine years before, was ordered to be amended, by putting the word *Trul*, the name of a vill, into its proper place, according to the deed of uſes. *Trul* had been by miſtake put into the recovery as an advowſon, not as a vill where land lay. It was objected againſt this amendment, 1ſt, That the eſtate was in truſtees at the time of the recovery, and, conſequently, the truſtees not being parties, there was no good tenant to the *præcipe*. 2dly, That the lands were cuſtomary tenure. 3dly, That the parties who ſuffered the recovery were volunteers. 4thly, That the wife of *Pullen*, the vouchee, was dead, and a recovery could not then be ſuffered to bar the remainders. The court ſaid, they would not enter into the queſtion, whether, in equity, recoveries of truſt eſtates would bar legal remainders, or into the other objections. When the recovery was amended, *valeat quantum valere poteſt*, the intention of the parties was the foundation for the amendment. The tranſaction appeared to be fair, and without fraud or colluſion. The principle upon which they went, was the ſtatute 8 *Hen.* 6. to amend the miſpriſion of the clerk. A *præcipe* was the curſitor's inſtruction for an original writ. A deed of uſes was the clerk's inſtruction for a recovery. The *præcipe* and deed were the things to amend by; and, Mrs. *Pullen* being dead, an amendment was the only remedy left.

Loggin and Pullen, Barnes 21.

Dowſe v. Reeve, 2 Boſ. and Pull. 578.

§ 17. The court will not grant leave to amend a recovery on affidavit only; it muſt appear on the face of the deed to lead the uſes, that there is ſufficient ground for an amendment.

In

Pearſon v. Pearſon, 1 H. Black. R. 73.

In a recovery, a farm called *Thiefſide*, otherwiſe *Thieviſhead*, was deſcribed to be ſituated in the foreſt of *Inglewood*, in the pariſhes of *Heſkit in the Foreſt*, and *St. Mary's Carliſle*, or one of them, in the county of *Cumberland*. It was afterwards diſcovered, that the whole of the ſaid farm was not within the pariſhes of *Heſkit in the Foreſt*, and *St. Mary's Carliſle*, as deſcribed in the recovery; but that part of it was in the pariſh of *Lazonby*, in the county of *Cumberland*. It was moved to amend the recovery, by inſerting the words "the pariſh of *Lazonby*" on an affidavit of the owner of the lands, the vouchee, ſtating as above, and that he meant to include all his eſtates in the county of *Cumberland* in the recovery, and that he did not know when he ſuffered the recovery, that any part of the ſaid farm was in the pariſh of *Lazonby*. The court would not, on this affidavit alone, grant leave to amend; but, upon reading the deed to lead the uſes, there was found the following clauſe: "And all other the eſtates, manors, or lord-"ſhips, meſſuages, lands, tenements, and heredita-"ments whatſoever, ſituate, lying, and being in the "county of *Cumberland*." This was holden by the court ſufficient to warrant an amendment, as it appeared on the face of the deed itſelf; and the rule for amendment was made abſolute.

Exceptions.

§ 18. No amendment, however, will be allowed in the deſcription of the eſtates comprehended in a recovery, where the recovery, as it ſtands, has lands of the vouchee to operate upon.

§ 19. Thus,

§ 19. Thus, where a motion was made to amend a recovery, by ſtriking out the city of *Litchfield*, and inſerting the county of *Stafford*, with other conſequential amendments, whereſoever the names of the county and ſheriff occurred, and alſo, by inſerting *Longden* (the name of a vill) after *Abnall*, another vill named in the recovery. The court obſerved, that it was a groſs miſtake in the attorney concerned in ſuing out only one recovery inſtead of two, and that they would willingly give the parties all the aſſiſtance they legally could to effect their evident intent, but it was beyond their power. In the caſes of amendments which had been cited, the party had no eſtate in the vill, or county, ſtruck out; therefore, *quoad hoc*, the recovery had no operation; but the preſent application was, to annul a valid recovery in the city of *Litchfield*, which had operated upon lands therein for near forty years, and to ſubſtitute in its ſtead a recovery in the county of *Stafford*. The motion was refuſed. Acton v. Baldwin, 2 Black. R. 874.

§ 20. Where there has been a miſtake of the clerk in the words of the judgment, the court has ordered it to be amended.

§ 21. Thus, there are two inſtances where, upon motion to amend a recovery, by ſtriking out the words *it is adjudged*, and inſerting the words *it is conſidered*, the court have ordered it to be done, as ſuch an amendment related to the act of the court in giving judgment. Barnes 20, 22.

§ 22. Amendments are alſo allowed in the writ of ſeiſin, and the return thereof.

Wilton and Fairfax, Barnes 23. Watſon and Lockley, 2 Will. R. 2.

§ 23. Thus, where a writ of ſeiſin was rightly directed to the ſheriffs of the city of *York*, but not returned in the name of any ſheriff, though a miſtaken return in the ſingular inſtead of the plural number was indorſed on the writ. The prayer of ſeiſin and return of the writ were ordered to be firſt amended, and then the roll and exemplification accordingly.

There muſt be ſomething to amend by.

§ 24. No amendment is allowed in a common recovery, unleſs there is an evident miſtake of the clerk, or ſomething to amend by.

Ante ch. 5. ſ. 13. Barnes 17.

§ 25. Thus, in the caſe of *Wynne* and *Wynne*, an application was made to the Court of Common Pleas, to amend the *teſte* and return of the writ of entry, and a rule to ſhew cauſe. The court, after hearing counſel on both ſides, and conſideration, was of opinion, that all amendments muſt be conſiſtent with the rules of law, and there muſt be ſomething to amend by. In this caſe, the vouchees, by law, could not appear until the return-day of the writ of ſummons, and the power of attorney given by *Alithea* to appear on that day was revoked by her death in the intermediate time. By the ſtatute 8 *Hen.* 6. original writs are amendable, if wrong, by miſpriſion of the clerk, or where there is any thing to amend by. Here was no miſpriſion of the clerk, the writ was made agreeable to his inſtructions, and there was nothing to amend by; the

the amendment prayed, is to amend in the firſt inſtance. The rule was diſcharged.

§ 26. By the ſtatute 23 *Eliz.* c. 3. ſ. 10. it is enacted, that no recovery ſuffered before that act, which ſhall be exemplified under the great ſeal, ſhall, after ſuch exemplification, be in anywiſe amended. And by the ſtatute 27 *Eliz.* c. 9. ſ. 10. no recovery ſuffered before that act, which ſhall be exemplified under any judicial ſeal of any of the ſhires of *Wales*, or the town or county of *Haverfordweſt*, or under the ſeal of any of the counties palatine, ſhall, after ſuch exemplication, be in anywiſe amended.

TITLE XXXVI.

RECOVERY.

CHAP. X.

Of the Operation of a Recovery in barring Eſtates Tail, Remainders and Reverſions.

§ 1. *Ancient Modes of barring Eſtates Tail.*
12. *A Recovery is a good Bar to an Eſtate Tail.*
23. *Of Joint Vouchers.*
35. *An Intail of a Rent barred by a Recovery.*
38. *Of Recoveries with Single and Double Voucher.*
55. *Effect of Recoveries in barring Remainders and Reverſions.*
61. *The Power of ſuffering a Recovery cannot be reſtrained.*

Section 1.

Ancient Modes of barring Eſtates Tail.

THE variety of inconveniencies which were produced by the ſtatute *de donis*, and the impoſſibility of obtaining a parliamentary repeal of it, induced the judges to adopt every poſſible means of evading and invalidating its effect; but the progreſs was gradual, and it was a long time before it was completely effected.

§ 2. The firſt rule which the judges adopted on this ſubject was, that the iſſue in tail could not avoid the alienation of his anceſtor, provided the iſſue was left a recompence in value by his anceſtor, for the eſtate tail which he had alienated.

§ 3. Thus,

§ 3. Thus, it was determined very ſoon after the ſtatute *de donis*, that if a tenant in tail loſt his eſtate tail, and recovered over in value; ſuch recovery in value was a good bar to the eſtate tail, becauſe the iſſue was not prejudiced. 10 Rep. 37 *b.* 2 Black. Com. 303.

§ 4. It was alſo determined upon the ſame principle, that a lineal warranty, with aſſets, was a good bar to the iſſue in tail. However, Lord *Coke* obſerves, that if a tenant in tail, aliened with warranty, leaving aſſets to deſcend, and the iſſue in tail aliened the aſſets, and died, the iſſue of that iſſue ſhould recover the eſtate tail, becauſe the lineal warranty deſcended to him *without* aſſets, which ſhews that the iſſue in tail could not be barred, unleſs he had a full recompence in value. Litt. f. 712. Idem 749. 1 Inſt. 393 *b.* 10 Rep. 37 *b.*

§ 5. The rule, that the iſſue in tail could not avoid the alienation of his anceſtor, provided he had a recompence in value, was ſtill farther extended, by a deciſion of the judges, in 44 *Edw.* 3. by which it was determined, that if tenant in tail granted a rent-charge in conſideration of a releaſe of right, to a perſon who had a prior right to the eſtate, ſuch a grant ſhould bind the iſſue in tail, becauſe it was made for his benefit, and the eſtate tail deſcended to him as a recompence for the grant.

§ 6. Thus, where a perſon brought a replevin for taking his cattle, the defendant avowed, for that one *Nicholas* was ſeiſed in tail of the manor of *B.* and had iſſue *John* and *Joan*; *Nicholas* died, *John* being then Octavian Lumbard's Caſe. 44 Ed. 3. Year book 21.

in *Ireland*; *Joan*, the daughter, entered, and died ſeiſed, leaving iſſue a ſon, named *Nicholas*, who entered; *John*, the ſon, having returned from *Ireland*, ſued for the land, but agreed to releaſe all his right to the eſtate tail to his nephew, *Nicholas*, in conſideration of a grant from *Nicholas*, of a rent of 20 *l. per annum*, with power of diſtreſs. This rent being afterwards in arrear, a diſtreſs and avowry were made on the lands charged, which were then in the poſſeſſion of the iſſue of *Nicholas*. The court was of opinion, that as *Nicholas*, who was tenant in tail, granted this rent in conſideration of a releaſe of right from *John*, who was really entitled to the eſtate tail; the grant was good, and ſufficient to bind his iſſue in tail, becauſe the eſtate tail deſcended to them as a recompence for this rent.

§ 7. In the preceding modes of barring eſtates tail, it may be obſerved, that the recompence in value, which deſcended to the iſſue in tail, was a real and *bona fide* recompence. But in 12 *Edw.* 4. a caſe aroſe in which the judges carried this principle to a much greater length, and determined, that a nominal and fictitious recompence, deſcending to the iſſue in tail, ſhould be an effectual bar, not only to the iſſue in tail, but alſo to all perſons in remainder or reverſion; and as the validity of recoveries depends even at this day on the authority and principles laid down in that caſe, it will be proper to ſtate it at full length.

Taltarum's Caſe, 12 Ed. 4. Year Book, 14, 19.

§ 8. *L. B.* being ſeiſed in fee of the lands in queſtion, gave them to one *William Smith*, to hold to him and

and the heirs of his body, by force of which he was ſeiſed. *William Smith* died, leaving *Humphrey* his eldeſt ſon, on whom thoſe lands deſcended, who entered, and was ſeiſed *per formam doni*. *Humphrey* enfeoffed one *Treges* of the ſaid lands in fee, who rendered them to the ſaid *Humphrey* and *Jane* his wife, and to the heirs of their two bodies, remainder in fee to the ſaid *Humphrey*, by force of which they were ſeiſed. Some time afterwards *Jane* died, on which *Humphrey* became ſole ſeiſed of the ſaid lands in tail; and being thus ſeiſed, one *Taltarum* brought a writ of right againſt *Humphrey*, and counted of his poſſeſſion againſt him. *Humphrey* made defence, and vouched to warranty one *R. King*, who entered into the warranty, and joined the miſe on the mere right; afterwards *R. King*, the vouchee, made default, and departed in contempt of the court; in conſequence of which, final judgment was given, that the demandant *Taltarum* ſhould recover the lands in queſtion againſt *Humphrey*, and that *Humphrey* ſhould recover lands of equal value of *R. King*, the vouchee. *Humphrey* afterwards died, without leaving heirs of his body, and the queſtion was, whether *Richard* the brother of *Humphrey*, who was heir in tail to thoſe lands, ſhould be barred by this recovery? It was determined by all the judges, that the eſtate tail was not barred by this recovery, becauſe the tenant in tail was not ſeiſed of the eſtate tail at the time of the recovery, but of another eſtate; and as the recovery in value goes according to the eſtate whereof the tenant was ſeiſed at the time of the recovery, and not in recompence of the eſtate he had not, the iſſue in tail could have no

Vid. 13 E. 1. No. 1. p. 1. Bro. Abr. tit. Recovery in Value, 19.

recompence in this caſe, and therefore was not barred by the recovery.

Pigot 9. It is obſervable, that this caſe was conducted with a good deal of art; for at firſt ſight the deciſion ſeems to be againſt the validity of a common recovery, in barring eſtates tail, but from the arguments of the judges it appeared they were all of opinion, that if the tenant in tail had been actually ſeiſed of the eſtate tail at the time of the recovery, the recompence in value would then have deſcended in lieu of the eſtate tail, and therefore the iſſue in tail would have been barred.

All the writers on our law have dated the æra of common recoveries from this deciſion, although the preceding caſes ſhew, that ſo early as the reign of *Edward* 3. the judges were extremely well inclined to give tenants in tail every aſſiſtance for enabling them to unfetter their eſtates.

§ 9. It is evident from this caſe, that the reaſon on which the judges grounded their original determination, that a common recovery was a good bar to an eſtate tail, was, becauſe the iſſue in tail had a recompence in value, either real or fictitious, for the eſtate tail which was recovered; but as ſeveral caſes aroſe in which the recompence in value could not poſſibly extend to all the eſtates which were barred, the judges have at different times exerted their ingenuity in inventing other reaſons to ſupport the validity of common recoveries. Thus, in the caſe of *Hudſon* v. *Benſon*, in *Mich.* 23 *Car.* 2. Lord Chief Juſtice *Hale*

2 Lev. 29. Freem. 363.

is

is reported to have ſaid: "the recompence of the "value is the reaſon of the bar by common reco- "veries, as to the iſſue in tail; but not the reaſon "why it bars, as to him in remainder or reverſion. "But the reaſon in this caſe is, becauſe the recoveror, "in ſuppoſition of law, is in of the eſtate tail, and "that in judgment of law has ſtill continuance; as at "Common Law, the donee, *poſt prolem ſuſcitatam*, "might have aliened and barred the donor; and a "common recovery is, as it were, a conveyance ex- "cepted out of the ſtatute *de donis*, and the recoveror "is in of the eſtate which the donee had; but the "iſſue in tail is barred to claim it, in reſpect of a "ſuppoſed recompence by the recovery."

§ 10. In Mr. *Ratcliffe's* caſe, which was argued before the Lords Delegates 6 *Geo.* 1. Mr. Baron *Mountague* obſerves that the words of Sir *M. Hale* reſpecting recoveries had been cited, and ſaid, "I "never found my opinion on the *dictums* of reporters, "in which they are very apt to miſtake the words and "ſenſe of the judges from whom they take them; "and ſo it ſeems to be in that caſe. Lord *Hale* is "there reported to have ſaid, that the recompence "in value is not the reaſon why common recoveries "are bars to the remainder-men, but becauſe thoſe "are conveyances excepted out of the ſtatute *de donis*. "But it is the text of *Litt. ſ.* 668. that if tenant in "tail ſuffered a feigned recovery, the iſſue might "falſify it in a *formedon*. This ſhews that at Com- "mon Law ſuch recoveries as we now make uſe of "to bar eſtates were not known; and therefore it "would 1 Stra. 289.

" would have been ridiculous in the ſtatute *de donis* " to have excepted recoveries, ſince common reco- " veries were not uſed, and recoveries on good title " could not be imagined to be included. If iſſue was " taken on the diſſeiſin alledged in the writ of entry, " and found for the demandant, and ſo the recovery " on a point tried, this at common law would bar " the iſſue, there lying an attaint againſt the jury; " though where it was by default it would not. But " afterwards another middle way was found out and " favoured by the judges, to prevent the inconveni- " ence of perpetuities; and that was, where the " tenant in tail appeared and vouched over, and the " vouchee made default, and ſo there was a judgment " for a recompence to one, and for the lands de- Salk. 563. " manded to the other. This judgment, though by " default, and without iſſue tried, was held a bar, on " account of the recompence in value."[a]

§ 11. It is extremely clear, from what has been premiſed, that the effect and validity of common recoveries cannot be ſupported by any of the maxims or principles of the common law, but that they are, *a fictio juris*, adopted for the purpoſe of deſtroying that ſpecies of perpetuity which was created by the ſtatute *de donis*; and the numerous advantages which aroſe from the deciſion of the court, in 12 *Edw.* 4. was a ſufficient juſtification of it. Beſides, common recoveries have now continued ſo long, and their utility is ſo fully underſtood, that the determination of the judges in *Taltarum's* caſe, ſo far from being conſidered as an unwarrantable ſtretch of their authority,

Law of Forfeit, 83. 1 Bla. R. 254 1 Burr. 115. Vide Willes Rep. 449.

muſt on the contrary be acknowledged to have been a meaſure of great public utility, and from which this country has derived infinite advantage.

A Recovery is a good Bar to an Eſtate Tail.

§ 12. But whatever were the reaſons on which the validity of common recoveries was originally founded, it may now be laid down as a certain maxim, or rule of law, which has prevailed for many centuries, that a common recovery is a common aſſurance, whereby all tenants in tail are enabled, by purſuing the proper form of this aſſurance, to bar their eſtates tail: And in *Mary Portington's* caſe, 11 *Jac.* 1. it was determined by all the judges, that judgment given againſt tenant in tail with voucher, and recompence in value, would bind the eſtate tail, notwithſtanding the ſtatute *de donis conditionalibus*, whether the recovery was upon good title or not; and that the judgment given in ſuch a caſe, for the tenant in tail to have in value, would bind the eſtate tail, although no recompence was had*.

10 Rep. 37 *b.*

* The following paſſage ſhews how ſtrongly the judges have always ſupported common recoveries. "At the Parliament held in "the reign of the late Queen *Elizabeth*, in the great caſe between "*J. Vernon* and Sir *Edward Herbert*, which was argued by learned "counſel before the Lords in Parliament; there *Hoord*, an utter "barriſter of counſel, with *Vernon* (who was barred by a common "recovery) raſhly and with great ill-will, inveighed againſt com-"mon recoveries, not knowing the reaſon and foundation of them; "who was with great gravity and ſome ſharpneſs reproved by Sir "*James Dyer*, then Chief Juſtice of the Common Pleas, who "ſaid, he was not worthy to be of the profeſſion of the law, who "durſt ſpeak againſt common recoveries, which were the ſinews of "aſſurances of inheritances, and founded upon great reaſon and "authority." 10 *Rep.* 40 *a.*

§ 13. A com-

§ 13. A common recovery is a good bar to the iſſue in tail, although the tenant in tail dies before the recovery is executed.

Shelly's Caſe, 1 Rep. 93. 1 Inſt. 361 *b.* Dyer 35; pl. 28.

§ 14. Thus where a tenant in tail ſuffered a common recovery, and died on the ſame day, before the court had awarded a writ of *habere facias ſeiſinam*; and it being doubted whether execution might be ſued againſt the iſſue in tail, the majority of all the judges were of opinion, that execution might be ſued againſt the iſſue in tail; for the right of the eſtate tail was bound by the judgment given againſt the tenant in tail, and the judgment over to recover in value, becauſe common recoveries were common aſſurances of land. But if a recovery be againſt tenant in tail upon a falſe title, who dies before execution, in a *ſcire facias* againſt the iſſue in tail, he may avoid it.

1 Inſt. 361 *b.*

1 Rep. 135 *b.* 136 *a.* Litt. ſ. 649.

§ 15. If a tenant in tail is diſſeiſed, and releaſes to the diſſeiſor, the eſtate tail is in abeyance: yet the tenant in tail may ſuffer a common recovery, which will bar the eſtate tail, the remainders, and reverſion.

Herbert v. Binion, 1 Roll. Rep. 223. Pop. 100. Barton v. Lever, Cro. Eliz. 388.

§ 16. If a tenant in tail levies a fine with proclamations, and afterwards ſuffers a common recovery, although the eſtate tail was deſtroyed by the fine, yet ſtill the recovery will bar the remainders and reverſion depending on the eſtate tail. The reaſon uſually given for this determination is, that when the tenant in tail is vouched, and comes in upon the voucher, he comes in of all the eſtates which were ever in him; and as the eſtate tail was once in him, it is therefore barred.

Roll, in his Abridgement, ſays, the reaſon of the determination is, becauſe a common recovery is a common aſſurance. It has alſo been ſaid, that the tenant in tail, after levying a fine with proclamation, has ſtill a *ſcintilla juris* in him, which enables him to bar the remainders.

2 Roll. Abr. 394.

2 Atk. 20.

§ 17. In caſe a tenant in tail levies a fine, and then dies, leaving iſſue, it ſeems to be a doubtful point, whether ſuch iſſue, by being vouched in a common recovery, can bar the remainders and reverſion depending on the eſtate tail. No caſe of this kind has, I believe, ever been judicially determined; but it is highly probable, that if a caſe of this nature aroſe, the judges would determine, that the remainders depending on ſuch an eſtate might be barred by a common recovery, in which the iſſue in tail was vouched; for otherwiſe ſuch remainders and reverſion muſt continue to ſubſiſt as a future eſtate or intereſt, to take effect in poſſeſſion upon the remote event of a general failure of iſſue of the tenant in tail, incapable of being barred or deſtroyed by any means whatſoever. This would be a perpetuity to a greater degree than what is allowed by our law, or ſhould be permitted in any commercial country.

2 Atk 201. Vide Fearne's Opinions 442.

It may alſo be obſerved, that if a tenant in tail after levying a fine has ſtill in him a *ſcintilla juris* ſufficient to enable him to ſuffer a common recovery, that *ſcintilla juris* deſcends on his death to the iſſue in tail, and therefore they are as well enabled to ſuffer a common recovery, as their anceſtor was.

§ 18. It

1 Roll's Abr. 394. Godb. 218. 1 Keb. 30. 398.

§ 18. It has been determined, that if a tenant in tail be attainted of treaſon, and afterwards ſuffers a common recovery, it will not deſtroy the remainder or reverſion, becauſe a perſon attainted is not capable of taking any thing but for the benefit of the king, and conſequently the recompence in value muſt go to the king; ſo that the perſon in remainder can have no benefit from it, and therefore is not barred: beſides, recoveries being common aſſurances, the recovery of a perſon attainted muſt be void in the ſame manner as any other conveyance of his would have been.

Recov. 73.

Mr. *Pigot*, however, ſeems to think, that there is ſuch a *ſcintilla juris* in the tenant in tail, after an attainder; that by a common recovery he may bar his iſſue, the remainders and reverſion; for if the king ſhould pardon the party, and reſtore the land, he might bar the entail, although the attainder remained in force.

1 Inſt. 349 *b.* 3 Rep. 3 *a.* 10 Rep. 38 *a.*

§ 19. An erroneous recovery ſuffered by a tenant in tail will bar his iſſue as long as it continues in force.

Machill v. Clerk. Com. Rep. 119. Salkeld, 619. Rep. temp. Holt, 615. Cro. Eliz. 471. Tit. 2. c. 2. ſ. 18.

§ 20. If a tenant in tail covenants to ſtand ſeiſed to the uſe of himſelf for life, with remainder to his ſon in tail, and afterwards ſuffers a common recovery, with ſingle voucher, to other uſes in fee, the recovery is good; for where a tenant in tail covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to his iſſue in tail, it is abſolutely void, and does not alter the eſtate.

§ 21. By

§ 21. By the ſtatute 14 *Eliz.* c. 8. which has been ſtated in a former chapter, all recoveries ſuffered by tenants for life are declared void; but there is a proviſo in that act, declaring that it ſhall not extend to recoveries where the *præcipe* is brought againſt the tenant for life, and the perſon next in remainder in tail is vouched; for in ſuch caſe the recovery is good, and will bar the eſtate tail.

§ 22. Thus, where *A.* being tenant for life, with remainder to her ſon in tail, a *præcipe* was brought againſt *A.* who vouched the ſon, who vouched over the common vouchee, by which means a common recovery was ſuffered. All the judges were of opinion, that the recovery was good, and not within the ſtatute of 14 *Eliz.* c. 8. and that the eſtate tail, and the remainders and reverſion, were well barred. Jenning's Caſe, 10 Rep. 43.

§ 23. If a *præcipe* is brought againſt a tenant in tail and his wife, where the huſband is ſole ſeiſed and the wife has nothing, and they both vouch over in the uſual manner, it will bar the eſtate tail. Of Joint Vouchers.

§ 24. Thus where *John Trevilian*, being tenant in tail, ſuffered a common recovery, in which he and his wife vouched over the common vouchee. It was objected, that the recovery was not effectual to bar the eſtate tail, becauſe the wife was named in the *præcipe* as joint tenant with her huſband, and appeared and vouched as joint tenant; and the vouchee entered into the warranty, admitting that he ought to warrant to them, whereby he alſo admitted that the wife had an eſtate Eare v. Snow, Plowd. 514. 18 Vin. Abr. 214.

eſtate in the tenancy, and had cauſe to vouch; and as ſhe ought to have the recompence in value by concluſion, there was therefore no reaſon why the iſſue in tail ſhould be barred; for the reaſon that an eſtate tail is allowed to be barred by a common recovery is, on account of the recompence in value, which is, or by poſſibility may be rendered; and if the wife was entitled to the recompence in value, and not the iſſue in tail, then there was no reaſon why the iſſue ſhould be barred. But the judges were unanimouſly of opinion, that in this caſe the eſtate tail was barred, for it was expreſsly found by the verdict, that the wife had nothing in the tenements at the time of the recovery, but that the huſband was ſole ſeiſed in tail; and as he alone loſt the tenancy, the recompence ſhould go to him, and ſhould be of the like eſtate with that he had loſt.

§ 25. If a *præcipe* be brought againſt a tenant for life and the remainder-man jointly, and they vouch over, ſuch a recovery has been determined to be no bar to the eſtate tail.

Leech v. Cole, Cro. El. 670. 2 Roll's Abr. 495. 3 Rep. 6 *b.*

§ 26. Thus where a perſon was tenant for life, with remainder to his eldeſt ſon in tail, and a *præcipe* was brought againſt the father and ſon jointly, who vouched over the common vouchee. It was held by three judges againſt one, that the eſtate tail of the ſon was not barred by the recovery; for the lands recovered in value muſt go in the ſame manner in which the eſtate that was loſt would have gone; whereas, in the preſent caſe, there being a joint *præcipe* brought againſt

againſt the tenant for life and the perſon in remainder, they muſt be ſuppoſed to be joint tenants, and the judgment muſt be accordingly; that as the reaſon why a recovery bars an eſtate tail is on account of the recovery in value, and as it cannot be averred that the lands recovered in value ſhall go in any other manner than that which is ſtated in the record, it follows, that the iſſue in tail can have no recompence.

Mr. *Pigot* obſerves, that theſe reaſons favour of a wonderful ſubtility; and that although no man would venture to ſuffer a recovery in this manner, yet that if a queſtion of this kind was now agitated, theſe diſtinctions would not be ſo eaſily admitted of, ſince the courts of law adopt every mode of ſupporting common recoveries, as aſſurances commonly uſed for the conveyance of eſtates. And in the caſe of *Page* and *Hayward*, the judges ſeem to have been of opinion, that a recovery of this kind would bar an eſtate tail.

§ 27. In that caſe a tenant in tail and the perſon in remainder joined in making a tenant to the *præcipe*, who vouched them jointly, and they in the ſame manner vouched over the common vouchee. It was objected, that as the voucher was joint, the recovery in value muſt be joint, and ſo the tenant in tail and the perſon in remainder muſt recover moieties in value; whereas the whole was recovered againſt the tenant in tail, and conſequently, to bind the iſſue, he ought to recover in value the whole; ſo that the recovery in value not being proportionable to the loſs, it

Page v. Hayward, Pigot 176. 2 Salk. 570. Rep. temp. Holt, 618.

was void. Lord Chief Juſtice *Holt* delivered the opinion of the court. As to the validity of the recovery in barring the eſtate tail, he obſerved, that if a *præcipe* was brought againſt a tenant in tail in poſſeſſion and a ſtranger in an adverſary action, and a recovery was had, it would be good: for when a *præcipe* was brought againſt ſeveral perſons, it was not neceſſary that they all ſhould be tenants of the freehold, for if any one of them had the freehold, it would be ſufficient. And if the bringing a *præcipe* againſt a tenant in tail and a ſtranger would not vitiate a recovery, neither would a joint voucher; for when the vouchee comes in and enters into the warranty, he is as much tenant in law to the writ, as if the *præcipe* had been originally brought againſt him; and ſo the caſe of a ſtranger being vouched jointly with the perſon who is ſeiſed of the eſtate did not differ from the caſe of a ſtranger being made tenant to the writ jointly with the perſon who had the freehold. If a tenant in tail conveyed the freehold to a third perſon againſt whom a *præcipe* was brought, and he vouched a ſtranger who vouched the tenant in tail, and the tenant in tail entered into the warranty, and vouched over the common vouchee, this would be a good recovery; for in an adverſary action, if the tenant to the *præcipe* vouched a ſtranger who never had any eſtate in the land, there was no remedy for it; the demandant could not counterplead the voucher, until the ſtatute of *Weſtminſt.* 1. c. 40. which was productive of great inconvenience, for when a *præcipe* was brought againſt the tenant of the land, he might vouch a ſtranger, and that ſtranger might vouch another

ſtranger,

ſtranger, and ſo on *in infinitum*; and therefore the ſtatute gave the counter-plea, that neither the vouchee, nor any of his anceſtors were ever ſeiſed of the lands in queſtion, by which they might have enfeoffed the tenant or his anceſtors; but with this exception, unleſs the warrantor were preſent, and would *gratis* enter into the warranty. If a ſtranger be a good vouchee, he becomes a good tenant to the writ, and a releaſe to him by the demandant after he has entered into the warranty is good, and the vouchee may plead it after the laſt continuance, for it is as valid as if it had been made to the tenant himſelf. Nor is it material whether there was any real warranty between the tenant and the vouchee when it is once admitted upon record, for it is then the ſame as if there really had been a warranty. The principal difficulty in the caſe was, becauſe the recovery in value was not proportionable to the loſs, for by the joint voucher the recovery in value muſt be joint, whereas the vouchees were tenants in tail of the whole, the one in poſſeſſion, the other in remainder, and this would be a great objection, if the caſe were conſidered upon the foot of the eſtoppel, for the tenant in tail will be eſtopped during his life from claiming more than a moiety of the recompence in value, but after his death the iſſue in tail will not be eſtopped, but may ſay that the tenant in tail in remainder had no eſtate in poſſeſſion in the land, ſo the recompence in value will go to him only. And there is no difference between this caſe and that of *Eare* v. *Snow*, in *Plowden* 514. where the Ante. huſband was tenant in tail of lands, and a *præcipe* being brought againſt him and his wife, they vouched

over the common vouchee, and the recovery was held to be good, though it was objected that the recompence in value, which was the cauſe of the bar, ſhould, if the wife ſurvived, go to her, and therefore the iſſue in tail was not barred. But it was held, that the iſſue in tail ſhould not be bound by any eſtoppel which his father admitted, by joining in the voucher with his wife, but might ſay that his father was ſole tenant in tail, and the wife had loſt nothing, and he being the perſon who had loſt the whole, ſhould have the whole recompence.

There was a caſe in *Trin.* 1657, *Rot.* 179, or 180, between *Murrell* and *Oſborn* (of which his Lordſhip ſaid he had a report in the hand-writing of Lord Chief Juſtice *Bridgman*) where, in a formedon the tenant in tail pleaded in bar a common recovery on a *præcipe* againſt the grantee of tenant in tail, in which the tenant in tail and a ſtranger were jointly vouched, and vouched over the common vouchee, and it was reſolved that the recovery was good. And there was alſo a caſe 23 *Hen.* 8. *Brooke's Ab.* tit. *Recoveries in Value* 27. where a woman was tenant in tail, and a *præcipe* being brought againſt her and her huſband, they vouched over the common vouchee, and the recovery was held good, though the huſband ſurvived, becauſe the recompence went in the ſame manner as the land recovered would have gone. This caſe was full in point, for the huſband was as much a ſtranger to the wife's eſtate tail as any other perſon; and ſo in *Eare* and *Snow* was the wife to the huſband; the only difference being, that in the caſe in *Brooke* the huſband muſt

muſt have been named, whereas in that of *Eare* and *Snow* the wife need not. His Lordſhip concluded with citing the caſe in 1 *Inſt.* 376 *a.* and *b.* where it is laid down, that if the heir at Common Law, and the heir in *Borough Engliſh* are jointly vouched, and vouch over the common vouchee, the heir in *Borough Engliſh* will have the whole recompence in value, becauſe it is he who ſuſtains the loſs, and ſo of heirs in Gavelkind—Judgment was given that the recovery barred the eſtate tail.

Vide Fearne's Opinions 338.

§ 28. It appears from this caſe, that where the tenant for life and the perſon entitled to the remainder in tail are jointly vouched in a common recovery it is good, and will bar the eſtate tail. And recoveries are now frequently ſuffered in this manner.

Pig. Recov. 27.

§ 29. Where two perſons are ſeiſed as joint tenants for life, with a remainder in tail to one of them, the perſon who has the remainder in tail may ſuffer a common recovery, which will bar his moiety of the eſtate for life, and alſo a moiety of his eſtate tail, for a recovery ſevers the jointure.

1 Inſt. 185 *a.*

§ 30. Thus, where a gift was made to *Lionel Morris* and *Ann Miles*, of the manor of *M.* to hold to the ſaid *Lionel* and *Ann*, and to the heirs of the body of the ſaid *Lionel*, remainder over. A writ of entry was brought againſt the ſaid *Lionel*, who vouched over the common vouchee, and judgment was given, and execution had according to the uſual form of common recoveries. It was unanimouſly re-

Marquis of Winchester's Caſe, 3 Rep. 1.

ſolved, that although *Ann Miles* was jointly ſeiſed with the ſaid *Lionel* for her life, ſo that as well *Lionel* as the vouchee might have abated the writ, yet when the vouchee, without demand of any lien, entered generally into the warranty, and thereby admitted the writ good, and *Lionel* recovered in value againſt the vouchee, who entered, according to the eſtate of the perſon who vouched; therefore, as to one moiety, the recovery was a good bar to the eſtate tail, and to the remainder over, becauſe the jointure was ſevered; but as to the other moiety, whereof *Ann Miles* was tenant for life, the recovery was no bar either to the eſtate tail, which *Lionel* had, expectant on the eſtate for life of *Ann Miles*, or to the remainder, becauſe for this moiety *Lionel* was not tenant to the *præcipe*.

Litt. ſ. 291. 1 Inſt. 187 *b.* Tit. 18. c. 1. ſ. 35.

§ 31. Huſband and wife being conſidered in law as one perſon, if an eſtate be limited to them and the heirs of their bodies, or to them and their heirs, they do not take by moieties, but are ſeiſed of one entire eſtate, and the huſband alone takes nothing; not the whole eſtate, becauſe the wife has a joint eſtate with him in poſſeſſion; nor an undivided moiety of the eſtate, becauſe there are no moieties between huſband and wife; ſo that if the huſband alone ſuffers a recovery of an eſtate of this kind, it will be no bar, either to a moiety or to the whole.

Owen v. Morgan, 3 Rep. 5.

§ 32. Thus, where lands were rendered by fine to huſband and wife for life, and to the heirs of the body of the huſband. A *præcipe* was brought againſt the huſband, who ſuffered a common recovery, with voucher

voucher over of the common vouchee, the wife being then alive. It was resolved, that this recovery, suffered by the husband only, should not bind the remainders, because there are no moieties between husband and wife, and the husband has no power to sever the joint tenancy, or to dispose of the land, during the life of the wife, he not being seised by force of the intail; and although the husband survived the wife, yet that was not material, because the law considered the case as it was at the time of the recovery.

§ 33. So, where it was found, that the grandfather covenanted to stand seised to the use of himself and his wife for their lives, with remainder to the heirs male of the said grandfather, on the body of the said wife begotten, remainder over; the grandfather suffered a common recovery and died, his wife having survived him. To support this recovery it was contended, that the case of *Owen* v. *Morgan* was not law; for if baron and feme had an entirety, then each had the whole, and therefore the baron might make a good tenant to the *præcipe* for the whole. *Pemberton contra*, that case was never questioned; the wife's estate hinders the intail from executing in the baron; so that it is only a kind of contingent estate after the death of the wife; and the estate tail cannot be tacked to the estate for life of the husband, during the life of the wife, because, during her life there is an intervening estate; it was therefore adjudged, that the recovery was void.

Clithero v. Franklin, 2 Salk. 568

1 Inſt. 187 *a.*

§ 34. It ſhould be obſerved, that although where an eſtate is given to huſband and wife, they do not take by moieties, yet if an eſtate be given to a man and a woman for life, in tail, or in fee, they then take by moieties. And even if they ſhould afterwards marry, they will continue to hold by moieties after their marriage.

An Intail of a Rent barred by a Recovery.

§ 35. We have ſeen that a common recovery may be ſuffered of a rent-charge iſſuing out of lands, and if ſuch a rent be granted in tail, with a remainder over, a recovery ſuffered by the tenant in tail will bar it.

Smith v. Barnaby, Carter 52. Sid. 285. Weeks v. Peach. Lut. 1224.

§ 36. Thus, where a perſon deviſed a rent of 50*l.* *per annum*, to be iſſuing out of lands to his ſon and his heirs; and if the ſaid ſon ſhould die without heirs male of his body, then he deviſed it over; the ſon ſuffered a recovery of this rent, and died without iſſue male. Lord Chief Juſtice *Bridgman*, and all the other judges were of opinion, that the recovery was good, and the remainder well barred; and this judgment was affirmed in the Court of King's Bench.

Chaplin v. Chaplin, 3 P. Wms. 229.

§ 37. A diſtinction has however been adopted between a grant of a rent-charge in tail, with a remainder over of the ſame rent-charge in fee, and a grant of a rent-charge in tail, without any ſubſequent limitation of it in fee. In the firſt caſe the tenant in tail acquires an eſtate in fee ſimple in the rent-charge by means of the common recovery, but in the ſecond

Tit. 28. c. 2. ſ. 3, 4.

he

he only acquires a baſe fee, determinable on his deceaſe and failure of iſſue.

Of Recoveries, with ſingle and double Voucher.

§ 38. A common recovery may be ſuffered with a ſingle, double, or treble voucher; and if a recovery is ſuffered without any voucher, as if judgment is given upon default, confeſſion, or *nient dedire* of the tenant, it does not bind the iſſue in tail, becauſe they have no recompence, and are not eſtopped by their father's judgment, as they claim paramount the eſtoppel *per formam doni*, and therefore they may falſify ſuch recovery.

Vide Moor 256. Bro. Recov. 19. 30.

§ 39. A recovery with ſingle voucher, that is, where the *præcipe* is brought againſt the tenant in tail himſelf who immediately vouches over the common vouchee, is a good bar to the eſtate, whereof the tenant in tail is in poſſeſſion at the time of the recovery; but is no bar to any other eſtate. A recovery, with double voucher, that is, where the tenant in tail is vouched and vouches over the common vouchee, is a good bar, not only to the eſtate whereof he is then in poſſeſſion, but alſo to all other eſtates to which he has any right, although ſuch eſtates be deveſted out of him and diſcontinued. A recovery, with treble voucher, is uſed to make a perpetual bar of the eſtate whereof the tenant to the *præcipe* was ſeiſed, and alſo of every eſtate of inheritance which has ever been in the firſt or ſecond vouchee, or their anceſtors; and alſo of all remainders and reverſions depending on thoſe eſtates, and all charges and incumbrances derived out of thoſe remainders and reverſions.

§ 40. The

Figot 109.

§ 40. The reaſon of the difference between a recovery with ſingle, and a recovery with double voucher, is, that in a recovery with ſingle voucher, where the *præcipe* is brought againſt the tenant in tail, who vouches over the common vouchee, if the tenant is not ſeiſed of the eſtate tail at the time, the iſſue in tail may, after the death of the anceſtor, plead, *nient tenant tempore brevis nec unquam poſtea*, and by that means avoid the recovery; for the tenant in tail not being ſeiſed of the eſtate tail at the time of the recovery, the recompence in value can only go in lieu of the eſtate whereof he was then ſeiſed, and not in lieu of the eſtate tail; ſo that, as to the iſſue in tail, it only operates as a recovery on a falſe title which never bound them, becauſe they could have no recompence in value. But where the tenant in tail comes in upon the voucher of the tenant to the *præcipe*, without demanding the lien, or counterpleading the warranty, he then comes in, in privity of all the eſtates he ever had, though the precedent eſtate, on which the voucher depends, is deveſted, diſcontinued, and turned to a right, and the recompence in value, which he has, or poſſibly may have, bars the iſſue.

Figot 114.
3 Rep. 60.
Moor 634.
Owen 130.

§ 41. If a tenant in tail be diſſeiſed, or diſcontinues the eſtate tail, by fine or feoffment, and takes back an eſtate to himſelf, in fee or in tail, and then ſuffers a common recovery with ſingle voucher, it will not bar the eſtate tail.

Ante.

§ 42. Thus, in *Taltarum*'s caſe it was reſolved, that the iſſue in tail was not barred by the recovery of his anceſtor,

anceſtor, becauſe the recovery was only with ſingle voucher, and the tenant in tail was not actually ſeiſed of the eſtate tail at the time of the recovery.

§ 43. So if there be tenant for life, remainder in tail to another perſon, and a ſtranger diſſeiſes the tenant for life, and then enfeoffs the perſon in remainder, againſt whom a *præcipe* is brought, and he ſuffers a common recovery, this will not bind the remainder in tail, becauſe the tenant in tail was not ſeiſed thereof at the time when the recovery was ſuffered, but had only a right thereto, and ſo the recompence in value could not extend to it. Lincoln College Caſe, 3 Rep. 58.

§ 44. Where a woman, who was tenant for life, married the remainder-man in tail, and they joined in levying a fine, *ſur done, grant & render*, whereby the lands were rendered to the woman for life, with remainder to the huſband and his heirs; afterwards the huſband and wife ſuffered a common recovery, with ſingle voucher, to the uſe of the huſband and his heirs. It was reſolved that this recovery was no bar, becauſe the perſon who ſuffered the common recovery was not ſeiſed of the eſtate tail at the time, but of an eſtate in fee, which he had taken back by the fine; ſo that the recompence in value went to the new eſtate in fee, and not to the old eſtate tail. Peck v. Channel, Cro. Eliz. 827.

§ 45. In the ſame manner, where tenant in tail, with remainder over, covenanted to ſtand ſeiſed to the uſe of himſelf and his heirs, until the marriage of his ſon, then to the uſe of himſelf for life, remainder to the Freſhwater v. Rois, Yelv. 51.

the uſe of his ſon and the heirs of his body, then ſuffered a common recovery with ſingle voucher, and died without iſſue. It was adjudged that the recovery did not bar the remainder, expectant on the eſtate tail, becauſe the covenant to ſtand ſeiſed had changed the eſtate tail into an eſtate in fee; ſo that the perſon who ſuffered the recovery was not ſeiſed of the eſtate tail at the time.

Fearn 42. Powell v. Price, 2 P. Wms. 536.

§ 46. Where a perſon is tenant for life, with an intervening eſtate of freehold to truſtees for preſerving contingent remainders to his ſons and daughters, and an unexecuted remainder in tail to himſelf; a recovery with ſingle voucher will not bar the remainders over.

Meredyth v. Leſlie, 6 Brown Parl. Ca. 338.

§ 47. Thus, where *Charles Meredyth* being ſeiſed in fee of the lands in queſtion, and having one ſon, *Henry*, by a former wife, previous to his marriage with his ſecond wife *Judith Savage*, by articles in conſideration of the then intended marriage, which ſoon after took effect, and of 1000 *l.* marriage portion, and of his natural affection for his ſon, *Henry*, covenanted to ſtand ſeiſed of the ſaid premiſes, to the uſe of himſelf for life, and after his deceaſe to the uſe of *Judith* for her life, and after her deceaſe to the uſe of his ſon, *Henry*, for life, remainder to truſtees to ſupport contingent remainders, remainder to the firſt and other ſons of *Henry* in tail male, remainder to his daughter in tail, *remainder to the heirs of the body of Henry*, remainder over. By indenture *tripartite*, between the ſaid *Charles Meredyth*, and *Henry Meredyth*,

Meredyth, his eldeſt ſon, and heir apparent, of the firſt part; *Philip Savage*, and *Henry Luther*, of the ſecond part, and *H. Wybrants*, of the third part. It was witneſſed, that in performance of the ſaid articles they the ſaid *Charles* and *Henry* covenanted, that *Charles* and *Judith*, his wife, and *Henry*, would, before the end of *Michaelmas* term then next, levy a fine, and ſuffer a recovery of the lands comprized in the ſaid articles, to the uſe of *Charles Meredyth* for life, and after his deceaſe, then as to a certain part of the ſaid lands to *Judith Meredyth* for life, for her jointure, remainder, after the death of *Charles* and *Judith*, to *Henry* for life, remainder to truſtees to preſerve contingent remainders, remainder to the firſt and other ſons of *Henry* in tail male, remainder to his daughters in tail, *remainder to the heirs of the body of Henry*, remainder over. After the death of *Charles Meredyth*, his ſon *Henry* entered upon the lands comprized in the articles and ſettlement, and ſuffered a recovery with ſingle voucher, the writ of entry being brought againſt himſelf as tenant of the freehold who vouched over the common vouchee. One of the queſtions in this caſe was, Whether this recovery ſuffered by *Henry* barred the eſtate tail of *Henry*, and the remainders over? The Houſe of Lords directed the Judges to deliver their opinion upon the following queſtion:—*A.* tenant for life, remainder to truſtees to "preſerve contingent remainders, remainder to his "firſt and every other ſon in tail male, remainder to "his daughters in tail general, remainder to the heirs "of his body, with remainders over. *A.* ſuffers a "recovery with ſingle voucher, being himſelf tenant

"to

" to the writ. Whether this recovery is good to bar " the remainders expectant upon the eſtate tail " of *A?*" Whereupon the Lord Chief Juſtice of the Court of Common Pleas having conferred with the Judges preſent, delivered their unanimous opinion, That the recovery with ſingle voucher did not bar the remainders over. And the Houſe of Lords decreed accordingly.

In the preceding caſes, if the recoveries had been ſuffered with double voucher, they would have been a good bar; becauſe, as the tenant in tail would then have come in upon the voucher, he would have been barred of all the eſtates and intereſts which were ever in him.

Ante. § 48. We have before ſeen, that where an eſtate is given to huſband and wife as joint tenants, with a remainder to the huſband in tail, a recovery ſuffered by the huſband alone, will not bar his remainder in tail, becauſe there being no moieties between huſband and wife, the huſband is not ſeiſed of the eſtate tail during the life of his wife.

§ 49. But if, in a caſe of this kind, the huſband ſuffers a recovery with double voucher, it will be a good bar of the huſband's eſtate tail, becauſe when he comes in as a vouchee, he comes in of all the eſtates which are in him.

Cuppledike's Caſe, 3 Rep. 5. § 50. Thus, where *A.* and his wife were ſeiſed of the manor of *B.* to them and the heirs male of the body

body of the ſaid *A.* The huſband levied a fine, and a writ of entry was brought againſt the cognizee of the fine, who vouched the huſband, and he vouched over the common vouchee, and judgment was given in the uſual manner. The queſtion was, Whether the remainder was well barred by this recovery, the wife not being vouched? And it was reſolved, that the recovery ſhould bar the remainder; for although the huſband alone was vouched, and not his wife, who had a joint eſtate with him, yet the huſband coming in as vouchee, the recovery barred all the eſtates which were ever in him.

§ 51. So where *A.* was ſeiſed of a manor to him and his wife, and to the heirs male of the body of the huſband. *A.* bargained and ſold the manor to a ſtranger, who ſuffered a common recovery, in which *A.* was vouched, who vouched over the common vouchee. It was adjudged, that although *A.* alone was vouched, and not his wife, yet that the eſtate tail was barred, for the reaſons given in the laſt caſe. Fitzwilliam's Caſe, 6 Rep. 52.

§ 52. In the ſame manner, where *A.* who was ſeiſed in fee of the lands in queſtion, upon the marriage of his ſon *D.* covenanted to ſtand ſeiſed, to the uſe of himſelf for life, remainder to the ſaid *D.* and his wife, and the heirs male of their bodies, remainder to *D.* and the heirs male of his body, with ſeveral remainders over. *A.* died, and *D.* ſuffered a common recovery with double voucher, in which he alone was vouched, and vouched over the common vouchee: Hallet v. Saunders, 2 Lev. 107.

the wife died, and afterwards *D.* died without iſſue. It was agreed, 1ſt, That this ſettlement being made before marriage, when the huſband and wife took by moieties, and not by intireties, the huſband had an abſolute power over his own moiety, and therefore, as to the huſband's moiety, the recovery was a good bar: in which this caſe differs from that of *Owen* v. *Morgan*, where the ſettlement being made after the marriage, the huſband and wife took by intireties. 2dly, That this recovery was no bar to the moiety of the wife, becauſe ſhe was not vouched. 3dly, That the eſtate tail, which was limited to *D.* and his wife and the heirs male of their bodies, being determined, the remainder to *D.* in tail male general, and all the other remainders depending thereon, were abſolutely barred by the recovery; for when *D.* was vouched, and vouched over, he came in of all the eſtates he had, and conſequently the remainder in tail male to himſelf, and all the remainders depending on it, were well barred.

Moody v. Moody, Amb. R. 649.

§ 53. *Edward Moody* tenant in tail under his father's will, with a contingent remainder in fee to himſelf, being about to marry, in 1709 conveyed, by way of immediate uſe, to the uſe of himſelf and his intended wife for their lives, with remainder to the heirs of their bodies, remainder to himſelf and his wife in fee; *Edward Moody* afterwards made his will and deviſed part of his eſtate, of which he had ſuffered a recovery, to his younger ſon, after the death of his wife. The wife died, and the eldeſt ſon ſet up a title to the eſtate. The bill was brought by the younger

younger ſon. It was argued for the plaintiff, that the conveyance being before marriage, the huſband and wife were intitled in moieties, and in that reſpect differed from the caſe of a conveyance to huſband and wife after the marriage; and that the recovery in which only the huſband was vouched barred a moiety of the eſtate. This was ſaid to be doubted in *Cuppledike's* caſe, but was ſetled in *Hallet* and *Saunders*.—It was argued for the defendant, 1ſt, that there being a covenant in the ſettlement to do all further acts by fine, recovery, &c. The recovery ſuffered by *Edward Moody* was to be conſidered as an act done, not in deſtruction but in confirmation of the ſettlement. 2d, That the huſband and wife were ſeiſed of an entire eſtate which, according to Lord *Coke*, is inſeparable, and therefore the recovery in which the huſband alone was vouched, was void *in toto*. In reply it was ſaid as to the firſt queſtion, that *Edward Moody* being ſeiſed of two eſtates tail, the recovery barred both, and as to the ſecond, the diſtinction was relied on between a joint eſtate given to the huſband and wife before marriage, and a joint eſtate given to them after marriage; the former is ſeverable, the latter not.—Lord *Camden*, Chancellor, after taking time from the 24th *January* to the 30th *May*, for conſideration, gave his opinion, Firſt, That the recovery was a confirmation of the ſettlement and not a deſtruction of it, being to be conſidered as a bar of the old intail only. This was a ſlight queſtion and deſerved little notice; where tenant in tail is vouched, he comes in of every eſtate he has; if it had been his intention only to have barred the old intail, he would have

Ante.

declared ſo. 2d, Queſtion, which is the only one that deſerves ſerious conſideration, is as to the operation of the recovery. In general a fine or recovery by one joint-tenant only ſevers the joint-tenancy, and operates on a moiety. *Co. Lit.* 187. makes the diſtinction between a joint eſtate given to the huſband and wife during the marriage, and a joint eſtate to them before marriage. In the former caſe their intereſt is not ſeverable, in the latter caſe they take in moieties. The doubt in *Cuppledike's* caſe aroſe on a joint eſtate during marriage; and 1 *Leon.* 270, is miſtaken as to Lord *Coke's* doubt, for the caſe of a joint eſtate before marriage is not mentioned in *Cuppledike's* caſe. The queſtion ſeems to have been determined in *Simmond's* caſe, *Moore* 92; the only doubt is, whether the huſband and wife can hold moieties; and in that caſe all the Judges held, there were ſeveral eſtates tail between huſband and wife. It follows that the recovery in this caſe is a ſeverance of the joint eſtate, and paſſes a moiety.

Ante. f. 17. § 54. We have ſeen that where a tenant in tail levies a fine and dies, leaving iſſue, it is a doubtful point whether ſuch iſſue, by being vouched in a common recovery could bar the remainders, &c. depending upon ſuch eſtate tail. But if it is admitted, that where a perſon is vouched, and vouches over, he comes in of all the eſtates and rights which are in him, it will follow that in a caſe of this kind the remainders may be barred by a common recovery, in which the iſſue of tenant in tail comes in upon the voucher.

§ 55. A com-

§ 55. A common recovery duly ſuffered is not only a good bar to an eſtate tail, but is alſo a bar to all remainders and reverſions depending on the eſtate tail, of which a common recovery is ſuffered, and to all charges and incumbrances created by the perſons in remainder and reverſion.

Effect of Recoveries in barring Remainders and Reverſions.

§ 56. Thus, where *William Capel*, being tenant in tail, remainder in tail to *Richard Capel*, *Richard Capel* granted a rent-charge of 50 *l. per annum* to his ſon; afterwards *William Capel* levied a fine of his eſtate tail to two perſons, againſt whom a *præcipe* was brought, who vouched *William Capel*, and he vouched over the common vouchee, by which means a recovery was ſuffered of the lands. *William Capel* died without iſſue, and the queſtion was, Whether this rent-charge, granted by the remainder-man, was barred by the recovery? It was reſolved by all the Judges, in the Exchequer Chamber, That this rent-charge was well barred, and that a common recovery, duly ſuffered by a tenant in tail, ſhould not only bind the remainder, and all leaſes, charges, and incumbrances, granted or made by the perſon in remainder, but alſo the reverſion, and all leaſes, charges, and incumbrances, granted or made by the perſon in reverſion; and that there was no difference between a reverſion and a remainder, expectant upon an eſtate tail, in that reſpect.

Capel's Caſe, 1 Rep. 62.

§ 57. So where *A.* was tenant in tail, remainder to *B.* in fee. *B.* granted his remainder to a ſtranger for life, with remainder to the Queen in fee, upon condi-

Cholmley's Caſe, 2 Rep. 52

tion. *A.* the tenant in tail, ſuffered a common recovery; and the queſtion was, Whether the recovery barred the eſtate for life, and the remainder upon condition to the Queen? It was reſolved, that the recovery not only barred the eſtate tail of *A.* but alſo the eſtate for life in remainder, and that the remainder in fee limited to the Queen was void.

Hudſon v. Benſon and Baron, 2 Lev. 28. Sir T. Ray. 236.

§ 58. *Rowland Morley* being ſeiſed in fee made a feoffment to the uſe of himſelf, and the heirs male of his body, remainder in tail to ſeveral other perſons, with a proviſo, that if *Rowland* and *Edward* his ſon, and Lady *Elizabeth Morley* ſhould happen to die, and there ſhould be no iſſue male of *Rowland*, that then *Ann Morley* ſhould have a rent-charge out of thoſe lands of 200 *l.* a year, until ſhe received the ſum of 2000 *l.* *Edward Morley*, the laſt iſſue male of *Rowland Morley*, made a leaſe for 1000 years, and afterwards levied a fine and ſuffered a recovery, and died without iſſue. The queſtion was, Whether the rent-charge of 200 *l.* a year, limited to *Ann Morley*, was barred by this recovery? It was argued, that the rent-charge was only a contingent uſe, which was not *in eſſe* when the recovery was ſuffered: ſo that the recompence in value could never extend to it, and therefore that it ought not to be barred. As to *Capel*'s caſe it was obſerved, that the rent was barred, becauſe it iſſued out of the remainder in tail, which was barred by the recovery. But it was reſolved, that the rent-charge was barred by the recovery, becauſe all the eſtates charged with the rent were barred; and that *Capel*'s caſe ruled the preſent caſe; for in that caſe

caſe all the objections were made which aroſe in the preſent caſe. And Sir *Matthew Hale* obſerved, that about the 9 *Eliz.* it was doubted whether, if a remainder for years were limited after an eſtate tail, it could be barred by a recovery ſuffered of the eſtate tail; becauſe the leaſe for years being only a chattel, no recompence in value could go to it; but it was now univerſally allowed, that ſuch a leaſe was barred by a recovery.

§ 59. Thus, if lands be limited to *A.* for life, remainder to his firſt and other ſons in tail, and, for want of ſuch iſſue, to truſtees for 500 years; the tenant in tail in poſſeſſion may bar this remainder for years by a common recovery. 3 Keb. 488.

§ 60. A gift was made in tail, determinable on the donor's payment of 1000 *l.* with a remainder over: before the day of payment, the tenant in tail ſuffered a common recovery, and it was adjudged, that the right of the donor to the 1000 *l.* and alſo the remainder over, were well barred. 1 Mod. 111. 1 Keb. 31. 3 Keb. 291.

§ 61. The power of ſuffering a common recovery is one of thoſe privileges which is ſo inſeparably annexed to an eſtate tail, that it cannot be reſtrained by any condition, limitation, proviſo, or covenant whatſoever. The Power of ſuffering a Recovery cannot be reſtrained. 1 Inſt. 223 *b.* *n.* 1. 6 Rep. 41 *a.*

§ 62. Thus, where *C. Corbet* covenanted to ſtand ſeiſed of lands to the uſe of himſelf for life, remainder to the uſe of *R.* and the heirs male of his body, Corbet's Caſe 1 Rep. 83. Mildmay's Caſe, 6 Rep. 40

with divers remainders over. Provided that if R. or any of the heirs male of his body ſhould attempt or procure any act, or thing, by which any eſtate tail ſo limited, ſhould be undone, barred, or determined, that then the uſes and eſtates to him limited, who ſhould ſo do, *&c.* ſhould ceaſe, only in reſpect to ſuch perſon ſo attempting, in the ſame manner as if ſuch perſon ſo attempting, *&c.* were naturally dead; and that then immediately in all ſuch caſes, the uſes of ſuch lands ſhould be to ſuch perſons for ſuch and the like eſtate, and in the ſame manner and form, and with ſuch remainders over, and under ſuch limitations and reſtrictions, *&c.* as if ſuch perſons ſo attempting, *&c.* were naturally dead. Afterwards *Corbet* died, and *R.* the firſt tenant in tail ſuffered a common recovery to his own uſe. The perſon next in remainder entered: and upon the queſtion, whether ſuch entry was lawful or not? the Court of Common Pleas unanimouſly agreed, that this *proviſo* to ceaſe an eſtate limited to one, and the heirs male of his body, *as if the tenant in tail were dead*, was repugnant, impoſſible, and againſt law. For the death of tenant in tail, was not a ceſſer of the eſtate tail, but the death of tenant in tail, without iſſue of his body, was the determination thereof.

Mary Portington's Caſe, 10 Rep. 37.

§ 63. So where lands were deviſed to ſeveral daughters ſucceſſively in tail, with a *proviſo*, that if any of them ſhould conclude and agree to or for the doing or execution of any act, *&c.* whereby the lands intailed, *&c.* or any eſtate or remainder thereof ſhould by any way or means, be diſcontinued or aliened, or ſhould

ſhould do any act or thing whereby the lands might not deſcend, remain, or come, as limited by the will, that then the perſon ſo concluding and agreeing to or for the doing and execution of any ſuch act, &c. ſhould immediately after ſuch concluſion and agreement, &c. loſe and forfeit ſuch eſtate and benefit as ſhe and they might claim, in ſuch manner as if ſhe or they had never been named in the will, and thenceforth the eſtate and eſtates limited to her or them ſhould utterly ceaſe, as fully to all intents and purpoſes as if ſhe or they were *dead, without heirs of their bodies.* The firſt tenant in tail concluded, and agreed to ſuffer a common recovery, and ſuffered one accordingly; the next in remainder claimed the eſtate as forfeited; and contended, that if the donor could not reſtrain the recovery after it was ſuffered, becauſe thereby the remainder was barred, yet he might reſtrain the concluſion and agreement to ſuffer it, to prevent the bar by the recovery. But it was adjudged, that tenant in tail cannot be reſtrained by any condition or limitation from ſuffering a recovery; and that it was abſurd to ſay that the recovery itſelf cannot be prohibited by any condition or limitation; and yet that the concluſion or agreement to ſuffer it may be prohibited; and it was alſo laid down in the arguments in the ſame caſe, that the levying a fine within ſtatute 4 *Hen.* 7. *c.* 24. and 32 *Hen.* 8. *c.* 36. to bar the iſſue, was of the number of thoſe incidents to an eſtate tail, which could not be reſtrained by condition.

§ 64. But although a condition, that tenant in tail ſhall not ſuffer a common recovery, is void, yet it has

been determined, that a covenant, not to ſuffer a common recovery, will bind the aſſets of the covenantor.

Collins v. Plummer, 1 P. Wms. 104. 2 Vern. 635.]

§ 65. Thus, where a perſon, in conſideration of marriage, ſettled lands upon himſelf for life, remainder to his intended wife for life, remainder to the heirs of his body on his wife to be begotten, remainder to his own right heirs, and covenanted with the truſtees, that he would not ſuffer any recovery to bar the limitations in the ſettlement. The huſband ſuffered a recovery of theſe lands to the uſe of himſelf and his heirs. The Lord Chancellor was of opinion, that the covenant did not bind the land ſo as to defeat the recovery. But it being preſſed, that they might be at liberty to ſue the executor, and recover out of the perſonal aſſets, an iſſue was directed to try what the wife and the iſſue of the marriage were damnified by the breach of this covenant.

Vide 2 Vernon 233. 251.

King v. Burchell, Amb. 379.

Earl of Suffolk v. Howard, 2 P. Wms. 177. Bettiſon v. Farringdon, 3 P. Wms. 363.

§ 66. Where an heir in tail is diſinherited by a common recovery, and ſeeks for relief in a court of equity, the recovery, together with the deeds for making a tenant to the *præcipe*, will be directed to be brought before a Maſter, that the perſon thus barred may have an opportunity of inſpecting them, and of ſeeing whether any thing can be diſcovered for his advantage.

TITLE

TITLE XXXVI.

RECOVERY.

CHAP. XI.

Of the Force and Effect of a Recovery in barring other Eſtates and Intereſts.

§ 2. *Dower, &c.*
7. *Truſt Eſtates.*
12. *What Poſſeſſion neceſſary.*
18. *Powers Appendant or in Groſs.*
§ 22. *Conditions Collateral.*
28. *Contingent Remainders.*
31. *Writ of Error.*

Section 1.

A COMMON recovery differs very much in its operation from a fine, for it has not the power of eſtabliſhing an undoubted title after a certain number of years. A fine was originally adopted, as a public and ſolemn mode of alienation; and its effect in barring intails, aroſe in conſequence of a poſitive law, made ſome centuries afterwards. A recovery was firſt generally introduced for the purpoſe of barring intails only, and, therefore, it has not, in ſome reſpects, ſo extenſive and powerful an effect as a fine. But in conſequence of the principle, that where a common recovery is ſuffered, the recoveror thereby acquires a new eſtate in fee-ſimple, it has been determined, that a recovery is a good bar to ſeveral other eſtates and intereſts in land, beſides eſtates tail.

§ 2. By

Dower, &c. 2 Inſt. 347.

§ 2. By the common law, where a huſband being impleaded, had given up the land demanded to his adverſary *de pleno*, that is, by a regular judicial ſurrender, the juſtices, upon a writ of dower brought by the wife, would adjudge the wife her dower. But, where the land was loſt by default, there was a difference of opinion; ſome juſtices holding that the widow was, in ſuch a caſe, entitled to dower, others, that ſhe was not. To remove this ambiguity, it was declared by the ſtatute of *Weſtminſter* 2. c. 4. that a woman claiming her dower, ſhould be heard in this caſe as in the former; and if it was objected to her, that her huſband loſt the land by judgment, ſo that ſhe ought not to have any dower, and upon enquiry it was found to be a judgment by default, then that the tenant ſhould further ſhew, what he had a right to according to the writ, which he had firſt brought againſt the huſband; and if he proved the huſband had no right, nor any one but himſelf, then that the judgment ſhould be *quod tenens recedat quietus*, and *quod uxor nihil capiet de dote*; but if he could not ſhew that, then that the woman ſhould have judgment *quod recuperet dotem ſuam.*

§ 3. It follows, from theſe principles, that a common recovery ſuffered by a huſband alone, will not bar his wife of dower, but if the wife joins in ſuch recovery, it will be a good bar to her claim of dower out of the lands compriſed in the recovery, although ſhe can have no recompence in value, and the wife ſhall be ſuppoſed to have joined in ſuch recovery, for the ſole purpoſe of barring herſelf from claiming her dower.

2 Rep. 74 *a.* 10—43 *a.* Pigot 66.

§ 4. Thus,

§ 4. Thus, in the caſe of *Eare* v. *Snow*, it was agreed by all the Judges, that the wife was named in the *præcipe*, in order that ſhe might be barred of her dower, for which purpoſe women were uſually named in recoveries had againſt their huſbands.

Ante ch. 10. Vide Tit. 35. ch. 10. ſ. 14.

§ 5. A woman may alſo bar herſelf of her jointure, by joining her huſband in ſuffering a common recovery, in the ſame manner as if ſhe had joined him in levying a fine, and for the ſame reaſons.

§ 6. If a married woman, having the truſt of a term in her, joins her huſband in ſuffering a common recovery of the lands out of which the term is created, ſhe will be thereby barred of all her claim to it, for ſhe comes in by voucher, in privity of all her eſtate legal and equitable.

Incledon v. Northcote, 3 Atk. 430.

§ 7. A common recovery ſuffered by a *ceſtui que truſt* in tail, who is in poſſeſſion under the truſtees, will be ſufficient to bar all remainders and reverſions depending on ſuch eſtate tail, although there be no legal tenant to the *præcipe*.

Truſt Eſtates.

§ 8. Sir *Francis North* purchaſed certain lands in *Eſſex* from *Richard Allington*, who was *ceſtui que truſt* in tail of them, with remainders over, and had ſuffered a common recovery; but there was no legal tenant to the *præcipe*, the freehold being in the truſtees, who were not parties to the recovery. The queſtion was, whether the remainders expectant on the eſtate tail were barred by this recovery. The decree was in theſe words:

North v. Champernoon, 2 Chan. Ca. 63. 78. 1 Vern. 13. 1 P. Wms. 91.

words: "His Lordſhip, upon long debate of the mat-
" ter, on hearing what was alleged by the counſel on
" either ſide, touching the ſame, declared that he was
" fully ſatisfied that the ſaid recovery did ſufficiently
" bar all remainders depending upon the eſtate tail of
" *Richard Allington* who ſuffered the ſame; it being
" a general rule, that any legal conveyance or aſſur-
" ance by a *ceſtui que truſt* ſhall have the ſame effect
" and operation upon a truſt, as it ſhould have had
" upon the eſtate in law, in caſe the truſtees had exe-
" cuted their truſt; otherwiſe truſtees, by refuſing or
" not being able to execute their truſt, might hinder
" the tenant in tail of that liberty, to diſpoſe of his
Beverly v. Beverley, 2 Vern. 131. " eſtate, and bar the remainders, which the law gives
" him as incident to his eſtate, which would be ma-
" nifeſtly inconvenient, and tend to the introducing
" of perpetuities."

Robinſon v. Cumming, Forreſt. 167. 1 Atk. 473.

§ 9. Recoveries of this kind only operate on the truſt eſtate whereof they are ſuffered, and the equitable remainders expectant thereon; but do not affect any legal eſtate, ſo that the legal remainder cannot be barred by an equitable recovery.

Salvin v. Thornton, cited 1 Brown's Caſes in Chan. 73. Amb. Rep. 545. 699.

§ 10. Thus, where *John Thornton* being ſeiſed of the premiſes for life, with remainder to his firſt ſon, *Thomas*, in tail male, remainder to his ſecond ſon, *James*, in tail male, forfeited in the rebellion in 1745. The eſtate for life being put up for ſale by the commiſſioners, was bought by *Thomas* (the tenant in tail) but in the name of a truſtee. *Thomas*, thus having the equitable eſtate for the life of his father, and the legal eſtate

eſtate tail, ſuffered a recovery, and ſoon after died, leaving iſſue a daughter, wife to the plaintiff. *James*, the ſecond ſon, took poſſeſſion, ſuffered a recovery (after the death of his father and the truſtee, in whom his eſtate veſted) and died, leaving two daughters, the defendants, who were in poſſeſſion. The bill was filed by *Salvin*, in right of his wife, for an account of profits, and to have the eſtate delivered up. Upon the hearing at the Rolls, his Honour ordered the bill to be retained for a year, with liberty for the plaintiff to try the validity of the recovery at law. But it was the opinion of the court, that *Thomas*'s eſtate for life being an equitable eſtate, and his eſtate tail a legal eſtate, did not enable him to ſuffer either a perfect legal or a perfect equitable recovery, and, therefore, the recovery ſuffered operated nothing.

Shapland v. Smith, 1 Brown's Ca. in Chan. 75.

§ 11. It has been held, in a modern caſe, that where an eſtate is deviſed to a perſon in fee-ſimple, upon truſt for ſeveral perſons ſucceſſively in tail, remainder in tail to the deviſee in truſt, ſuch a remainder may be barred by an equitable recovery; for to create a merger of the equitable in the legal eſtate, by their union, both eſtates muſt be co-extenſive and commenſurate; and, therefore, that an equitable recovery would bar an equitable remainder in tail in the perſon who had the whole legal fee.

Brydges v. Brydges, 3 Veſ. Jun. 120.

§ 12. In recoveries of this kind, there muſt be an equitable tenant to the *præcipe*, that is, the truſt eſtate muſt be conveyed to a third perſon, againſt whom the writ

What Poſſeſſion neceſſary.

writ muſt be brought, in the ſame manner as in recoveries of legal eſtates.

Burnaby v. Griffin, 3 Veſ. Jun. 266.

§ 13. Where an eſtate was deviſed to truſtees and their heirs, in truſt to receive and pay over the rents and profits to a married woman for life, for her ſeparate uſe, and, after her deceaſe, to convey to her daughters as tenants in common in tail, with remainder, it was held, that the wife took an equitable eſtate for life, and that a conveyance from her and her huſband, by leaſe and releaſe, was ſufficient to make a good equitable tenant to the *præcipe*.

2 Ch. Ca. 64.

§ 14. If there be a *ceſtui que truſt* for life, before the *ceſtui que truſt* in tail, ſo that, in caſe the legal eſtate had been conveyed according to the truſts, the tenant in tail could not bar the eſtate tail by a common recovery, there the *ceſtui que truſt* in tail cannot bar his eſtate tail by a recovery.

Tit. 12. ch. 1. ſ. 27.

§ 15. Where an eſtate is conveyed or deviſed to truſtees and their heirs, upon truſt to pay debts generally, or ſuch debts as are ſpecified, and after payment of ſuch debts, or when ſuch debts ſhall be paid, then in truſt for *A. B.* or in truſt to convey ſuch parts of the eſtate as ſhall remain unſold to *A. B.* in either of thoſe caſes *A. B.* has a truſt eſtate in the ſurplus veſted in him immediately upon the execution of the deed, or the death of the teſtator, and may ſuffer an equitable recovery of ſuch eſtate.

§ 16. This

§ 16. This point was lately inveſtigated with great learning and ability in conſequence of an objection that was made to the title of the Marquis of *Bath* to an eſtate upon the following caſe:

By a ſettlement previous to the marriage of Lord *Bath* (then Lord *Weymouth*) certain eſtates were conveyed to the uſe of Lord *Bath* for life, remainder to the intent that Lady *Bath* ſhould receive a jointure, remainder for a term of years to raiſe portions for younger children, remainder to the firſt and other ſons of the marriage. The eſtate thus ſettled being ſubject to ſeveral incumbrances, other eſtates were limited to truſtees in fee, upon truſt to ſtand ſeiſed thereof as a collateral ſecurity to protect the ſettled eſtates; and, in order to diſcharge the ſaid incumbrances, it was declared, that the truſtees ſhould, by mortgage or ſale of the eſtates conveyed to them, raiſe ſuch ſums of money as ſhould be neceſſary to pay off the incumbrances; and it was agreed, that after all the incumbrances ſhould be paid, and all the other truſts ſhould be performed, the truſtees ſhould ſtand ſeiſed of ſo much of the ſaid eſtates as ſhould remain unſold, and of the equity of redemption of ſo much as ſhould have been mortgaged, upon truſt to ſettle and convey the ſame to Lord *Bath* for life, remainder to his firſt and other ſons in tail male. No ſale or mortgage was ever made by the truſtees, nor were any of the incumbrances paid off until 1787, when Lord *Bath* and his eldeſt ſon joined in a recovery of the eſtates which had been conveyed to the truſtees. The validity of this recovery was objected to, becauſe it was ſuffered before the debts were paid,

Vide Collectanea Juridica, vol. 1. p. 214.

2 Atk. 578. 1 Vesey 144.

paid, and the objection was founded on a *dictum* of Lord *Hardwicke* in the case of *Bagshaw* v. *Spencer*, which was a devise to five persons and their heirs, in trust to pay debts, and then as to one moiety to the use of *Benjamim Bagshaw* for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of *Benjamin Bagshaw*, remainder over. *Benjamin Bagshaw* suffered a recovery before the debts were paid, and a suit in Chancery being instituted to ascertain what estate *Benjamin Bagshaw* took by this devise, Lord *Hardwicke* said, that the devise to *Benjamin Bagshaw* was merely a trust in equity, for, as the first devise was to the trustees and their heirs, it carried the whole fee in point of law; that it could not be construed an executory devise of the legal estate, for, in that case, it would be too remote, being given after all debts should be paid, which might, in point of time, exceed a life or lives in being, or any other time allowed by law. After which, his Lordship is stated to have said these words: "That the recovery "suffered was before the debts were paid, and, conse- "quently, *Bagshaw* could not make a good tenant to the "*præcipe* to support the recovery." Upon the authority of this passage, it was contended, that whether the limitation to Lord *Bath* was considered as a springing or shifting use at law, or a springing executory trust, it was not barred by the recovery suffered by Lord *Bath*, because, at the time of suffering the recovery, the event on which the limitation was to take effect, namely, the discharge of the debts, had not happened. On the other side, it was clearly laid down and proved by Sir *John Scott*, Mr. *Maddocks*, and Mr. *Fearne*, that the

the limitation to Lord *Bath* in the ſettlement, gave him an immediate veſted intereſt in the ſurplus of the eſtate after payment of the debts; that in the caſe of *Bagshaw* and *Spencer*, both the Maſter of the Rolls and Lord *Hardwicke* agreed, that the deviſe to *Benjamin Bagshaw* was an intereſt actually veſted in him. As to the idea of its being an executory deviſe of the legal eſtate, Lord *Hardwicke* ſaid, if the will was to be conſtrued in that manner, the deviſe would be too remote, being after payment of debts; but even admitting it to be a good executory deviſe of the legal eſtate to *Benjamin Bagshaw*, yet it did not veſt in him, nor could his deviſee claim it, *becauſe the recovery was ſuffered before the debts were paid, and conſequently whilſt the fee was in the truſtees, ſo that he could not make a good tenant to the præcipe.* The meaning of the expreſſion of Lord *Hardwicke* ſo much relied on, was therefore no more than this—that a perſon to whom an executory deviſe of a legal eſtate is made cannot ſuffer a recovery until the event, on which the executory deviſe is directed to take effect, has happened.

It was admitted, that there was a ſtrict analogy between executory deviſes and ſpringing executory truſts, from which, it was concluded, that if a deviſe of an eſtate after payment of debts was not good as an executory deviſe, a limitation of the ſame kind in a deed would be void as a future executory truſt; conſequently, the truſt created in Lord *Bath's* ſettlement, to ſettle the eſtates after payment of the debts, would have been void as an executory uſe or truſt, and the eſtate muſt have reſulted to Lord *Bath* and his heirs

who was the original owner of the inheritance; from whence it followed, that any conveyance by Lord *Bath* would make a good equitable title, ſubject to the truſt for payment of the debts. It was, laſtly, ſaid, that the payment of debts was not a condition precedent, which muſt be performed before a ſubſequent limitation or deviſe could take effect, but ſuch ſubſequent limitation or deviſe was an intereſt commencing at the ſame time, and concurrent with the limitation or deviſe for payment of debts; and the words *after payment of debts*, or *when the debts ſhall be paid*, only denoted the order or courſe in which the ſeveral intereſts ſhould take place in point of actual poſſeſſion and perception of the profits, without preventing the ſubſequent eſtates, whether legal or equitable, from becoming veſted in intereſt, at the ſame time with thoſe which were prior to them in point of limitation.

Piggot v. Waller, 3 Veſ. Jun. 98.

§ 17. It was determined in a modern caſe, that a truſt eſtate paſſed by the deed to make a tenant to the *præcipe*, the words being ſufficiently extenſive for that purpoſe, although the tenant in tail did not apprehend at the time that the eſtate belonged to him; and that, as no adverſe poſſeſſion was ſhewn, the rightful owner muſt be preſumed to have been in poſſeſſion.

Powers Appendant, or in Groſs.

§ 18. Where a perſon has a power appendant, or in groſs, if he ſuffers a recovery of the lands, to which the power relates, it will bar and deſtroy it, becauſe the lands are ſuppoſed to have been recovered by a right which is paramount to that of the perſon who

created the power, and which therefore over-reaches it.

§ 19. Thus, where lands were deviſed to *Bernard Melling* for life, and, after his death, to the iſſue of his body by a ſecond wife (he having at the time of the deviſe another wife), and for default of ſuch iſſue, to *John Melling*, provided that *Bernard* might ſettle a jointure on his ſecond wife. *Bernard Melling* entered on the death of the deviſor, and, during the life of his firſt wife, ſuffered a common recovery, to the uſe of himſelf and his heirs.

King v. Melling, 2 Lev. 58. 1 Vent. 225.

It was agreed, in the Exchequer-chamber, by all the judges, 1ſt, That *Bernard Melling* took an eſtate tail by the deviſe; and, 2d, That the power to make a jointure was deſtroyed by the recovery.

§ 20. A ſettlement was made of lands to the uſe of *A.* for ninety-nine years, if he ſhould ſo long live, remainder to truſtees during the life of *A.* to preſerve contingent remainders, remainder over, with a power to *A.* to charge the lands with divers ſums of money. *A.*, the truſtees, and the remainder-man in tail, joined in ſuffering a common recovery, and declaring new uſes thereof, *viz.* to the uſe of *A.* for life, with remainder over. It was determined, that the joining of *A.* in making the new ſettlement, without reſerving a power to charge the premiſes with the ſaid money, had deſtroyed that power which *A.* had of charging; for the contrary conſtruction would enable him to defeat his own grant.

Saville v. Blackett, 1 P. Wms. 777.

Tit. 35. ch. 10. f. 54.

§ 21. Powers collateral to the land are not barred by a common recovery, for the ſame reaſon that they are not barred by a fine.

Conditions Collateral. Fearne 310.

§ 22. A common recovery ſuffered by a tenant in tail, bars all collateral conditions which are to take place on the determination of ſuch eſtate tail.

Page v. Hayward, Pigot 176.

§ 23. Thus, where *Nicholas Searle* deviſed lands to his niece *Mary Bryant*, and the heirs-male of her body, upon condition, and provided ſhe intermarried, and had iſſue male by a perſon ſirnamed *Searle*, and, in default of both theſe conditions, he deviſed the lands to *Elizabeth* in the ſame manner. *Mary Bryant* married one *Cliff*, and with him levied a fine, and ſuffered a recovery of the lands in which ſhe and her huſband were vouched. It was adjudged by the whole court; 1ſt, That the eſtate deviſed to *Mary* was a good eſtate in ſpecial tail; that is, to her and the heirs-male of her body begotten by a *Searle*; 2d, That the words upon condition, &c. though expreſs words of condition, ſhould be taken to be words of limitation; 3d, That the eſtate tail of *Mary* did not ceaſe by marrying a perſon whoſe name was not *Searle*, becauſe ſhe might poſſibly ſurvive her firſt huſband, and afterwards marry a perſon of the name of *Searle*; 4th, That if the eſtate had been deviſed to *Mary*, and the heirs-male of her body, by a *Searle* to be begotten, provided, and upon condition, that if ſhe married any other perſon but a *Searle*, the eſtate ſhould go over, a common recovery ſuffered before marriage would bar the eſtate tail and remainders; and the court took a difference between a collateral

collateral condition, and a condition that runs with the land; for if a donor reſerves a rent with a condition to re-enter, a recovery will not bar it; *aliter*, if the condition be to re-enter for non payment of a ſum in groſs. 1 Mod. 108. 111. 2 Lev. 28.

§ 24. So, where lands were deviſed to ſeveral perſons ſucceſſively in tail, and a clauſe was inſerted by the teſtator, that whenever the eſtates deviſed ſhould come to any of the perſons therein named, they ſhould take upon them the name of *W.* only. The firſt perſon to whom the lands were deviſed in tail, ſuffered a common recovery of the eſtate tail, in which he was vouched, and vouched over, and never took the name of *W.*; the perſon who was next in remainder, entered for a breach of the *proviſo*, on account of the firſt deviſee's not having changed his name. It was agreed by the whole court, that if this *proviſo* were conſidered as a condition, it was collateral and ſubſequent, and was therefore well barred by the recovery. Gulliver v. Aſhby, 4 Burr. 1929. Amb. Rep. 328.

§ 25. *Devereux Edgar* being ſeiſed of the premiſes in queſtion, deviſed them as follows: "I give and "bequeath unto my daughter *Temperance Edgar*, all "that my farm or eſtate called the *Breed Farm*, &c. "to hold the ſame from and after the death of my "wife, to the ſaid *Temperance* my daughter, and to "the heirs of her body lawfully begotten; and for "want of ſuch heirs, to my right heirs for ever. *Item*, I give and bequeath unto my daughter *Mary* "*Edgar* all that my farm, &c. to have and to hold "to the ſaid *Mary*, and to the heirs of her body law- Driver ex dem. Edgar v. Edgar, Cowper 379.

" fully to be begotten; and herein my mind and will " is further declared, that in caſe either of my ſaid " daughters *Temperance* or *Mary* ſhall happen to die, " or depart this life, ſingle, married, or widows, not " leaving children or child living at their deceaſe le- " gally begotten, that then her gift, legacy, or bequeſt " herein, or eſtate given her by this my will, ſhall be " entirely void as to inheritance of heirs, and of none " effect; and the eſtate ſo given her, ſo dying without " heirs of her body, ſhall deſcend and go to my heir " male and his heirs male." *Mary Edgar* ſuffered a recovery of the premiſes in queſtion, to the uſe of herſelf in fee, and afterwards died unmarried. The queſtion was, Whether the recovery ſuffered by *Mary Edgar* barred the limitation over? Lord *Mansfield* ſaid, the validity of the recovery ſuffered by *Mary* depended upon whether ſhe was tenant in tail, or tenant for life of the eſtate thus deviſed to her. Now the eſtate was given to her and the *heirs of her body*, which was an eſtate tail; nevertheleſs, the intention of the teſtator might reſtrain that eſtate of inheritance, and confine it to an eſtate for life only; and, although it was inſiſted, that the teſtator had reſtrained the eſtate of inheritance during her life, yet he had only reſtrained it upon future contingencies, the firſt of which was the event of her own death; but, until that contingency happened, the inheritance was in her. The ſecond was upon her leaving no children. It was manifeſt that the intention of the teſtator was, to prevent a common recovery being ſuffered; but where a teſtator intends that which by law he cannot do, the law will not allow his intention to take effect. If, therefore, *Mary Edgar* was tenant

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in tail to the hour of her death, nothing was ſo clear, as that all conditions limited upon ſuch an eſtate tail, were avoided by the common recovery which had been ſuffered; and the court were of opinion, that *Mary* took an eſtate tail by the deviſe.

§ 26. Although a common recovery ſuffered by a tenant in tail bars all collateral conditions ſubſequent, and limitations over; yet a common recovery has this operation only when ſuffered by a tenant in tail; for a recovery ſuffered by a tenant in fee-ſimple will not bar an executory eſtate, conditional limitation, or collateral condition, as will be ſhewn in a ſubſequent chapter. Fearne Ex Dev. 67 n.

§ 27. If a gift in tail be made, rendering a rent, and the tenant in tail ſuffers a recovery, it will not bar the rent, which will ſtill remain as a collateral charge on the land diſtrainable of common right; for ſince the tenant in tail took the land ſubject to that charge by the original donation, the recoveror who claims under him can only have the eſtate in the ſame manner as he who ſuffered the recovery had it. But if there had been a condition of re-entry, on the non-payment of the rent, it would have been deſtroyed. Whyte v. Weſt. Cro. Eliz. 792. 2 Lev. 30. 1 Mod. 109. Pigot 139.

§ 28. A common recovery bars all contingent remainders depending on the eſtate whereof the recovery is ſuffered, becauſe the recovery deſtroys the particular eſtate on which the contingent remainders depend. Contingent Remainders. Tit. 16. c. 6. ſ. 5.

Plunkett v. Holmes, 1 Lev. 11. Sir T. Ray. 28 Gilb. Uſes 133

§ 29. Thus, where a perſon deviſed lands to his eldeſt ſon *Thomas* for life, and if he died without iſſue living at the time of his death, then he deviſed the lands to another ſon and his heirs; but if *Thomas* had iſſue living at the time of his death, that then the fee ſhould remain to the right heirs of *Thomas* for ever. *Thomas* entered upon the death of his father, and ſuffered a common recovery, and afterwards died without iſſue. It was reſolved, that *Thomas* was tenant for life, with a contingent remainder in fee to his right heirs, and that the contingent remainder was deſtroyed by the recovery.

Loddington v. Kime, 1 L. Raym. 203. Salk. 243. 3 Lev. 431. Fearne 282.

§ 30. So where lands were deviſed to *A.* for life, without impeachment of waſte; and, in caſe he ſhould have any iſſue male, then to ſuch iſſue male, and his heirs for ever; and if he ſhould die without iſſue male, then to *B.* and his heirs for ever. *A.* entered, ſuffered a common recovery, and died without iſſue; and it was held, that the remainders over being contingent, were barred by the recovery. Another caſe aroſe on this will, in which the ſame point was determined by the Houſe of Lords. And in the caſes of *Doe ex dem. Brown* v. *Holm*, 3 *Wilſon's Reports* 237. *Goodright* v. *Dunham*, *Douglas* 264. and *Goodright* v. *Billington*, id. 753. this doctrine is confirmed.

Carter v. Barnadiſton, 1 P. W. 505.

Writ of Error.

§ 31. A common recovery ſuffered after an erroneous fine, will bar the iſſue in tail from bringing a writ of error to reverſe the fine; and even an erroneous recovery will bar a writ of error to reverſe a fine until the recovery is reverſed, becauſe a common recovery

with voucher, bars every kind of right which the vouchee or his heirs can have to the land; but a void recovery is no bar.

§ 32. Thus, where *R. Barton*, being tenant in tail, levied an erroneous fine, and afterwards a writ of entry was brought againſt the cognizee, who appeared and vouched over *R. Barton*, and he vouched over the common vouchee. After the death of *R. Barton*, the iſſue in tail brought a writ of error to reverſe the fine, to which the recovery was pleaded in bar. And it was reſolved, that when tenant in tail levies an erroous fine, he hath yet a right to the land, which, by his entry into the warranty, and recovering thereby an intended recompence in value, is barred. For although tenant in tail cannot by deed releaſe errors to bar the iſſue in tail, yet as by fine or recovery he may bar the eſtate tail itſelf, ſo may he bar the writ of error; and when he enters into the warranty and vouches over, and hath recompence, he is in by his warranty of all eſtates, and the recompence in value is a ſufficient bar to all eſtates and rights which he had in him.

Barton v. Lever, Cro. Eliz. 388.

TITLE XXXVI.

RECOVERY.

CHAP. XII.

Of ſome other Effects of a Recovery.

§ 1. *Operates as a Forfeiture of an Eſtate for Life.*
4. *Eſtoppel.*
5. *In ſome Caſes alters the Deſcent.*
9. *Revokes a Deviſe.*
10. *Lets in prior Incumbrances.*

Section 1.

Operates as a Forfeiture of an Eſtate for Life. Pelham's Caſe, 1 Rep. 15.

A Common Recovery ſuffered by a tenant for life, without the concurrence of the perſon in remainder or reverſion, operates as a forfeiture of his eſtate for life, in the ſame Manner as if he had levied a fine, or made a feoffment in fee. This doctrine was deduced from the Common Law; for if a demandant in a real action recovered againſt a tenant for life by default, or *nient dedire*, or by pleading covenouſly, to the diſheriſon of the perſon in reverſion, the tenant for life forfeited his eſtate; for he was entruſted with the freehold, and was to anſwer the *præcipes* of ſtrangers, and defend his own, as well as the reverſioner's eſtate; ſo that when he gave way to the demandant's action, or vouched a ſtranger, he admitted the reverſion to be in ſuch demandant or ſtranger, and conſequently denied the tenure of the reverſioner, which was a forfeiture.

1 Inſt. 35 *b*. 252 *a*.

§ 2. If

§ 2. If a tenant for life has alſo an eſtate in remainder, he may then ſuffer a common recovery without incurring a forfeiture. Doe v. Lord Mulgrave, 5 Term Rep. 320.

§ 3. One *Richards* being tenant for life, with remainder to his firſt and other ſons in tail, remainder to the heirs of his body. *Richards* conveyed his eſtate by leaſe and releaſe to a third perſon to make him tenant to the *præcipe*, and ſuffered a recovery. The queſtion was, whether this recovery operated as a forfeiture. The court was of opinion that the recovery did not operate as a forfeiture. That the paſſage in 1 *Inſt.* 35 *b.* could only be underſtood of a bare tenant for life who took upon himſelf to do an act inconſiſtent with the nature of his eſtate, and which before the ſtatute of 14 *Eliz.* would have diſplaced the remainders. The forfeiture of his eſtate was therefore a proper puniſhment upon him for attempting to do an act inconſiſtent with his tenure, and calculated to injure the perſon in reverſion. But the law will never puniſh a man for doing that which is not inconſiſtent with the nature of his eſtate, and which may have a legal operation. Such was this caſe, for *Richards* ſtood in two ſeveral characters, that of tenant for life, with a remainder in tail ſubſequent to that limited to his firſt and other ſons. This remainder in tail was all that he ſought to bar, and the law ſays that having the immediate freehold, and an eſtate tail in remainder in him, he has a right to bar it. The next thing then was, whether the recovery itſelf would operate ſo as to ſubject him to a forfeiture, and as to this the court were unanimouſly of opinion that it did not, becauſe there was a legal ſubject for it to work upon, namely, his remainder in tail. Smith v. Clifford, 1 Term Rep. 738. Ante c. 8. f. 20.

tail. *Richards* was vouched and entered into the warranty, not in reſpect of his tenancy for life, but of his remainder in tail; and the recompence in value is ſuppoſed to go to thoſe who would have been intitled to *his* eſtate tail and thoſe who ſtood ſubſequent to them, and paſſed over his firſt and other ſons, who had the firſt eſtate tail in them; and as they received no recompence, their eſtate was not diſplaced or in any manner affected by the recovery.

Vide ante Meredith v. Leſſee, S. P. ch. 10. f. 47.

Eſtoppel. Pigot 123.

§ 4. The judgment in a common recovery being of equal force with a judgment obtained in an adverſary ſuit, will operate as an eſtoppel againſt all thoſe who are parties to it, and conclude them from averring any thing againſt it. But a common recovery, when ſuffered of an eſtate tail, will not operate as an eſtoppel againſt the iſſue in tail, the emainder-men, or reverſioner.

Ante ch. 3. f. 46.

10 Mod. 45.

In ſome Caſes alters the Deſcent. Tit. 29. ch. 3. f. 43.

§ 5. If a tenant in tail by purchaſe, under a marriage-ſettlement made by his anceſtor *ex parte materna*, with the reverſion in fee by deſcent *ex parte materna*, ſuffers a common recovery to the uſe of himſelf in fee, this eſtate will deſcend to his heirs *ex parte paterna*.

Martin ex dem. Tregonwell v. Strachan, 1 Stra. 1179. 1 Will. Rep. 66. 5 Term Rep. 107. note. Will. R. 414.

§ 6. Thus, where *John Tregonwell*, being ſeiſed in fee of the lands in queſtion, upon the marriage of *Mary* his eldeſt daughter with *Francis Luttrell*, by indenture executed in the year 1680, covenanted to levy a fine, and ſuffer a recovery to the uſe of himſelf for life, remainder to *Francis Luttrell* for life, remain-

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der to his daughter *Mary* for life, remainder to the firſt and other ſons of the ſaid *Mary* by the ſaid *Francis Luttrell*, remainder to the firſt and other ſons of the ſaid *Mary* by any other huſband, with remainder to his own right heirs in fee. A fine was levied, and a recovery ſuffered, to the uſes of this indenture.

On the death of *Francis Luttrell*, without iſſue male, the ſaid *Mary* married Sir *Jacob Banks*, and had iſſue by him a ſon named *Jacob*, who, on the death of his father and mother became ſeiſed of an eſtate tail, in the ſaid premiſes, and of the reverſion in fee, *ex parte materna*, and in the year 1725, ſuffered a common recovery in the uſual form, having by a deed of bargain and ſale inrolled, made a tenant to the *præcipe*, and declared by the ſame deed, that ſuch recovery ſhould be and enure to the uſe of himſelf and his heirs, and died without iſſue. Upon the death of *Jacob Banks*, *John Strachan* entered into the lands in queſtion, as heir *ex parte paterna*, and *Thomas Tregonwell* brought an ejectment againſt him, claiming thoſe lands as heir to the ſaid *Jacob Banks*, *ex parte materna* The queſtion was, whether this recovery did or did not operate as a new purchaſe, and thereby alter the deſcent? The Court of King's Bench was of opinion that this recovery altered the nature of the eſtate, and made it deſcendible to the heirs *ex parte paterna*.

A writ of error was brought from this judgment in the Houſe of Lords, and on behalf of the plaintiff in error, who claimed *ex parte materna*, it was argued, that 6 Brown Parl. Ca. 319.

that the rule of law is clear, that the eſtate of one dying ſeiſed by deſcent *ex parte materna*, can deſcend to none but the heir *ex parte materna*, it being founded on natural juſtice, that an eſtate ſhould go to the blood and family from whence it came, and where the owner himſelf has not thought fit to give it away from them: that this eſtate was originally the inheritance of *Jacob Banks*'s mother and her anceſtors; and therefore, if there had been no interruption in the courſe of deſcent, it muſt now deſcend to the plaintiff: that the only interruptions inſiſted on were the ſettlement of 1680, and the recovery and deed of uſes in 1725. As to the former it was only a temporary interruption of the poſſeſſion, by the particular or partial eſtates carved out of the fee, the inheritance being ſtill left to deſcend, *ex parte materna*; and whenever thoſe particular eſtates ſhould determine, whether by the death of the parties, or by bar or extinguiſhment of them, the poſſeſſion would return to the old inheritance again: and as to the latter, the recovery and deed of uſes only determined, and barred the particular eſtates, and conſequently let the fee into poſſeſſion, in the ſame condition and quality as when in reverſion, and therefore could not alter the nature of the ancient uſe, or the deſcendible quality of it: that this is clearly the caſe where a fine is levied by tenant in tail, who has the reverſion in fee in himſelf, it having been ſettled, that ſuch a fine extinguiſhes the eſtate tail, and lets the old reverſion into poſſeſſion; nor is there any material difference between a fine and a recovery; for, ſo far as their reſpective powers reach, they are both univerſally held to be bars of

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the particular eſtates and conveyances of their own inheritance in fee. It is objected, that a recovery not only bars the eſtate tail but the remainders alſo. But that diſtinction is totally immaterial, becauſe it affects only the extent of the bar or extinguiſhment, not the manner in which thoſe inſtruments operate; it proves the recovery to be a bar or extinguiſhment of the eſtates tail, both in poſſeſſion and remainder, but does not prove it to be leſs a bar or extinguiſhment of either; and the bar or extinguiſhment of both, by the recovery, as much lets in the reverſion in fee after both, as a bar or extinguiſhment, by fine of one, lets in the reverſion in fee dependant on that one only: that this diſtinction could not be applicable to the caſe of a recovery by tenant in tail, with an immediate reverſion in fee to himſelf; and it would be extremely difficult to maintain, that in ſuch a caſe the uſe would be the old one, and go *ex parte materna*; but that in the preſent caſe, it was a new one, only, becauſe there was an intermediate remainder in tail, which was equally, and but equally, barred with the eſtate tail in poſſeſſion; or if that ſhould be admitted to be no material point of diſtinction, it would be as hard to maintain, that if tenant in tail, with reverſion in fee in himſelf, deſcending *ex parte materna*, bars the eſtate tail by fine, the reſulting or declared uſe in fee to himſelf would be the ancient uſe, and go *ex parte materna*; but that if the ſame tenant in tail bars the ſame eſtate tail by a recovery, the reſulting or declared uſe would be a new uſe, and go *ex parte paterna*: that it was apprehended no caſe could be cited to warrant this diſtinction; and if not, reaſon and equity pointed

pointed out that they ought both to have the ſame effect.

It is alſo objected, that a recovery is the proper conveyance of a tenant in tail, with remainder over, and therefore operates as a grant from him; and that the recoveror comes in under him, in the *per*, as his grantee, and therefore as a purchaſer. But this would be, to make the recovery operate, not as a bar to the particular eſtates tail in poſſeſſion and remainder, which is the ſenſe and language of all the books, but as a bar to his own reverſion in fee, which is abſurd; nor indeed is a recovery, in any other ſenſe, a grant from the tenant in tail, than as it is a common aſſurance, by which he may bar thoſe particular eſtates, and acquire or convey the fee ſimple in poſſeſſion: but it is not leſs ſuch an acquiſition, if he gets it by barring the particular intermediate eſtates, and letting his own fee into poſſeſſion, than if it could be ſaid to be a grant of the eſtate tail itſelf to himſelf in fee. But whatever might be the caſe, where the eſtate tail in poſſeſſion, together with the remainder or reverſion in others, include the whole inheritance, yet where the tenant in tail in poſſeſſion has alſo the reverſion in fee, the recovery operates as a conveyance of the reverſion, and a bar to the intermediate eſtates. A recovery is not a ſort of conveyance more proper to bar remainders, than a fine is to bar an eſtate tail alone; nor can the recoveror come more under the tenant in tail, or his eſtate, or be more properly a grantee from him of his eſtate tail, than the conuſee of a fine is under the conuſor; and yet, in this latter caſe, that notion

clearly

clearly does not prevent the eſtate tail from merging in the fee. It is, however, further objected, that the eſtate tail is continued and enlarged by the recovery; but this is at beſt a very inaccurate manner of ſpeaking, if not unintelligible or abſurd, ſince an eſtate tail cannot continue longer than the iſſue *per formam doni*; and a fee ſimple cannot with any propriety be called an enlarged eſtate tail. The only reaſonable ſenſe of ſuch expreſſion, is, that the tenant in tail, by exerciſing the power which the law has given him, of barring the eſtates tail, has become poſſeſſed of the abſolute fee in poſſeſſion; but in this ſenſe it is no otherwiſe an enlargement of his eſtate, than a ſurrender of the tenant for life to the remainder-man in fee, is an enlargement of the remainder-man's eſtate, and is therefore more properly an enlargement of the fee ſimple, by ſinking the particular eſtate, than an enlargement of the particular eſtate, which is abſolutely deſtroyed, nor does this manner of conſidering the recovery, in the leaſt injure the abſoluteneſs of that power which the law gives the tenant in tail over the eſtate, becauſe he acquires as much this way as the other, with this advantageous circumſtance, that it keeps the eſtate in its natural channel, and prevents the act done for one purpoſe only, from enuring to another, which the party never thought of, and which, if he had, he might, and probably would have avoided.

In ſupport of the judgment it was contended, that *Jacob Banks* being tenant in tail, under the ſettlement of 1680, by purchaſe, and not deſcent, the rule of

deſcent, relied on by the plaintiff in error, was only applicable where the perſon, whoſe eſtate is in queſtion, was at the time of his death ſeiſed by deſcent, and no way affected or influenced the preſent queſtion, if *Jacob Banks* acquired the fee by ſuffering a recovery, as tenant in tail by purchaſe: that a tenant in tail is conſidered in law as poſſible owner of the whole fee, *viz.* that the remainders and reverſions are in his power by ſuffering a recovery, which is the act of tenant in tail, and takes its effect out of the eſtate tail, in right of which alone he is empowered to ſuffer ſuch recovery, as he thereby acquires, in judgment of law, an abſolute and pure fee againſt the remainder-men and reverſioner, although the reverſion were in a ſtranger; whereas, by a fine, the eſtate tail is only extinguiſhed, and barred, as againſt the iſſue in tail; but, as to the remainder-men, or reverſioner, it ſubſiſts, notwithſtanding that act, as a baſe or determinable fee, on failure of iſſue: it was therefore apprehended, that by the recovery, which removed all reſtraints and limitations enſuing or dependent after the eſtate tail, the fee ſo acquired by *Jacob Banks*, proceeded out of the eſtate tail, and took its effect to the uſe of the perſon ſo enabled in law to ſuffer the ame, as the reſult of his power, in virtue of the eſtate tail, which was gained by ſettlement (*i. e.*) by purchaſe, and conſequently the remainders and reverſions which ſubſiſted before the recovery were alike extinguiſhed, and put to an end, by force and operation of ſuch recovery: that if the eſtate tail, as to the iſſue only, is conſidered as barred by a recovery, and the old eſtate in fee or reverſion, ſubject to the eſtate

tail, is let in, and takes place as contended for by the plaintiff, the conſequence and inconvenience thereof would be, that in that caſe every eſtate in the kingdom, of which a recovery is ſuffered by a tenant in tail, ſeiſed alſo of the reverſion in fee, would ſtill remain liable as aſſets by deſcent to the ſpecialty debts of the anceſtor, from whom it deſcended (for the eſtate tail, while it ſubſiſts, and the baſe fee, gained by force of a fine, ſuſpends the remedy, ſo long as there is iſſue, and therefore preſerves the debts,) and this form of conveyance, invented and long uſed to ſtrengthen the title of poſſeſſors who are tenants in tail, would be a means of deſtroying ſuch intention, and would revive old demands to the ruin of many families.

After hearing counſel on the writ of error, the judges (who attended according to order) were directed to deliver their opinions on the following queſtions, *viz.* "Whether, upon the death of *Jacob* "*Banks*, the eſtate in queſtion did by law deſcend to "his heir, on the part of the mother or not?" And the judges, having taken time to conſider, the Lord Chief Juſtice of the Common Pleas delivered their reaſons at large, and concluded with their opinions, "That the eſtate in queſtion, upon the death of "*Jacob Banks*, did not deſcend to his heirs on the "part of the mother." Whereupon it was ordered and adjudged, that the judgment given in the Court of King's Bench ſhould be affirmed.

Roe v. Baldwin, 5 Term R. 104.

§ 7. The principle upon which this caſe was decided is, that by the recovery the eſtate tail was converted into an eſtate in fee; and as *Jacob Banks* took the eſtate tail as a purchaſer, he muſt have taken the fee as a purchaſer alſo, and conſequently it deſcended to his heirs *ex parte paterna*; but in the caſe of an eſtate tail by deſcent, a recovery will not make it deſcendible to the heirs *ex parte paterna*, where it was before deſcendible to the heirs *ex parte materna*, and this doctrine extends as well to copyhold as to freehold eſtates.

Abbot v. Burton, 11 Mod. 181.

§ 8. It follows from the ſame principle that a recovery ſuffered of an eſtate in fee ſimple will not alter the nature of the deſcent.

Revokes a Deviſe, Tit. 38. ch. 6.

§ 9. A common recovery operates as a revocation of a prior deviſe of the lands whereof the recovery is ſuffered, upon the ſame principle that a fine has that effect.

Lets in prior Incumbrances. 1 Rep. 62 *a*. 2 Rep. 52 *b*. Pigot 120. 1 Wilſon's R. 277. 9 Rep. 10 *b*.

§ 10. A common recovery ſuffered by a tenant in tail, lets in all his preceding incumbrances, and renders valid all the acts of ownerſhip which he has exerciſed over the eſtate tail. So that if a tenant in tail makes a leaſe not warranted by the ſtatute 32 *H*. 8. or acknowledges a judgment or recognizance, and afterwards ſuffers a common recovery, it will operate as a confirmation of theſe charges which were before defeaſible by the iſſue; for the recoveror acquires an eſtate in fee ſimple derived out of the eſtate tail, and therefore all thoſe acts which bound the tenant in tail

will alſo bind the recoveror, who cannot aver that the perſon againſt whom he recovered had but an eſtate tail. It is therefore extremely dangerous for a tenant in tail, who has made leaſes, acknowledged judgments, or incumbered his eſtate tail in any other manner, to ſuffer a common recovery, becauſe all thoſe incumbrances will thereby become valid, and take place before any charge which is made on the lands after the recovery.

§ 11. Although a recovery be ſuffered for a particular purpoſe, yet it will confirm all prior incumbrances. Thus, in the caſe of *Goddard* v. *Complin*, the following queſtion was put: Tenant in tail mortgages for years, and afterwards, in conſideration of marriage, ſuffers a recovery, for the purpoſe of ſettling a jointure on his wife. Whether this recovery ſhould enure to make good the mortgage, it being only deſigned for eſtabliſhing the marriage ſettlement? It was anſwered, that if there had been no recovery, there could have been no jointure, nor could the wife have avoided the mortgage, for ſhe was in by the act of her huſband, and no ſubſequent act of the huſband could have avoided the mortgage. It was alſo ſaid, that if a tenant in tail confeſſes a judgment, *&c.* and ſuffers a recovery to any collateral purpoſe, the recovery ſhall enure to make good all his precedent acts and incumbrances. 1 Chan. Ca. 119.

§ 12. Where a tenant in tail makes any conveyance or ſettlement of his eſtate tail, which is not binding on his iſſue; if he afterwards ſuffers a common reco-

very, it will enure to make good the preceding conveyance or ſettlement.

Goodright ex dem. Tyrrell v. Mead and Shilſon, 3 Burr. 1703.

§ 13. Thus, where a perſon, ſeiſed to him and the heirs male of his body, remainder to his own right heirs, by leaſe and releaſe, previous to his marriage, conveyed his eſtate to truſtees, to the uſe of himſelf for life, remainder to the uſe of his intended wife for life, remainder to his firſt and other ſons in tail male; the marriage took effect, and they had iſſue a ſon: nineteen years afterwards the huſband ſuffered a common recovery, and declared it to be to the uſe of *A. B.* and his heirs, in truſt to ſell the premiſes for the payment of his debts; *A. B.* ſold the lands for the payment of the debts, according to the truſt repoſed in him; the tenant in tail died, and his ſon claimed the lands. The court were unanimouſly of opinion, that the recovery enured to the uſes of the ſettlement, and therefore that the purchaſer had no title.

Cheney v Hall, Amb. Rep 526.

§ 14. *Gerard Walker* the father, by ſettlement on his marriage conveyed an eſtate to the uſe of himſelf for life, remainder to the firſt and other ſons of the marriage in tail. In 1733 the ſon on his marriage conveyed part of the eſtate by leaſe and releaſe to the uſe of himſelf for life, remainder to his intended wife for life, remainder to the heirs of the body of the wife, remainder to his own right heirs. In 1746 the father and ſon mortgaged the premiſes to *Henry Peach* for 1000 years to ſecure 300*l.* and ſuffered a common recovery, and declared the uſes to the mortgagee and then to the father for life, remainder to the ſon in fee.

Lord

Lord *Hardwicke* was clearly of opinion that the recovery enured to the uſes of the ſettlement of 1733.

§ 15. The principle that a common recovery ſhall operate as a confirmation of any preceding incumbrances created by the perſon who ſuffers ſuch recovery, is founded in natural juſtice, which forbids men to defeat their own contracts. But where a tenant in tail, with the reverſion in fee in himſelf, creates incumbrances, and his ſon (on whom the eſtate tail and reverſion in fee deſcends) ſuffers a recovery, it will not, like a fine, operate ſo as to let the reverſion into poſſeſſion, and thereby make it liable to the debts of his father; becauſe the operation of a recovery is to deſtroy all remainders and reverſions expectant on the eſtate tail, and the fee acquired by the recoveror proceeds out of the eſtate tail. It follows, that where a perſon is tenant in tail by deſcent, with the reverſion in fee in him alſo by deſcent, he ought never to bar his eſtate by fine only, but ought alſo to ſuffer a common recovery, which will effectually prevent the eſtate thus acquired from becoming liable to the debts or contracts of his anceſtor.

Tit. 35. c. 12. f. 6.

TITLE XXXVI.

RECOVERY.

CHAP. XIII.

What Perſons, Eſtates, and Intereſts, are not barred by a Recovery.

§ 1. *Perſons who are not Parties.*
2. *Eſtate precedent to that of which the Recovery is ſuffered.*
6. *An Executory Deviſe.*
§ 8. *Eſtates Tail granted by the Crown as a Reward for Services.*
20. *Reverſions veſted in the Crown.*
23. *Tenants by* Elegit, &c.
24. *Eſtates held in Dower.*

Section 1.

Perſons who are not Parties.

NO perſons are barred by a common recovery but thoſe who are parties to it, and the iſſue in tail, the remainder-men, and reverſioners, and perſons claiming under conditional limitations expectant on, or to take effect after eſtates tail. Thus, if lands are given to a huſband and wife, and the heirs of the body of the huſband, remainder over, and the huſband alone ſuffers a common recovery in which he comes in upon the voucher and vouches over, ſuch recovery will bar the eſtate tail, and the remainder over; but it will not bar the wife's eſtate, becauſe ſhe is not a party to it.

Pigot 65.

§ 2. No

§ 2. No eſtates or intereſts are barred by a common recovery, but thoſe which are ſubſequent in point of limitation to the eſtate of which the recovery is ſuffered; for all intereſts precedent remain as they were before.

Eſtates precedent to that of which the Recovery is ſuffered.

§ 3. Thus, although a recovery be a good bar to a remainder for years limited, to commence after the determination of an eſtate tail; yet if ſuch term be limited to ariſe before the eſtate tail, it will not be barred by a recovery ſuffered of the eſtate tail.

Pigot 137.

§ 4. *A.* being tenant for life, remainder to *B.* in tail, *B.* made a leaſe for years, to commence after the death of the tenant for life. The tenant for life afterwards ſuffered a common recovery, in which the remainder-man in tail was vouched: and it was determined that the term for years was not barred by the recovery, but that the leſſee might falſify it.

Pledgard v. Lake, Cro. Eliz. 718. Dyer 51 *b.* in Mar. Poph. 5.

§ 5. If a perſon is tenant for life, with remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail male, remainder to his daughters as tenants in common in tail, remainder over: and having a daughter, he joins with her in ſuffering a common recovery, it will be good againſt the tenant for life, and his daughter, and the remainder-man; but the eſtates tail limited to the firſt and other ſons, being prior to the eſtate of the daughter, and being

1 Inſt. 204 *b.* note.

being ſupported by the limitation to the truſtees, will not be affected by the recovery.

An Executory Deviſe. Tit. 38. c. 17.

§ 6. A common recovery does not bar an executory deviſe, unleſs the perſon to whom the executory deviſe is given, comes in as a vouchee.

Eſtates Tail granted by the Crown as a Reward for Services.

§ 8. When recoveries were eſtabliſhed as common aſſurances, the judges determined, that every ſpecies of eſtate tail, whether created by a ſubject or by the crown, was barrable by a recovery, as alſo all ſuch remainders over and reverſions as were veſted in any private perſons; and even where the ultimate reverſion was veſted in the crown, it was fully eſtabliſhed that a recovery would bar the iſſue in tail and all eſtates in remainder intermediate between the eſtate tail and the reverſion veſted in the crown, for, otherwiſe, a perpetuity might have been created by limiting an ultimate reverſion in the crown.

Dyer 32 *a.* 2 Rep. 15, 50.

§ 9. The power thus allowed by the judges to tenants in tail with reverſion in the crown, of barring their own iſſue, was taken away by the ſtatute 34 and 35 *Hen.* 8. c. 20. by which it was enacted, ſect. 2. "That no feigned recovery to be had by aſſent "of parties againſt any tenant or tenants in tail of any "lands, tenements, or hereditaments whereof the re- "verſion or remainder at the time of ſuch recovery "had ſhall be in the king, ſhall bind or conclude the "heirs in tail, whether any common voucher be had "in

" in any ſuch feigned recovery or not; but that after " the death of every ſuch tenant in tail againſt whom " any ſuch recovery ſhall be had, the heirs in tail may " enter, have, and enjoy the lands, tenements, and he- " reditaments ſo recovered, according to the form of " the gift of intail, the ſaid recovery, or any other " thing or things to be had, done, or ſuffered by or " againſt any ſuch tenant in tail to the contrary not- " withſtanding."

Sect. 3. And " That the heirs of every ſuch " tenant in tail againſt whom any ſuch feigned re- " covery ſhall be had, ſhall take no advantage for " any recompence in value againſt the voucher nor " his heirs."

§ 10. The object and intention of theſe acts was, to perpetuate in families, thoſe eſtates which were given, or procured to be given to them by the crown, as a reward for ſome eminent ſervices, that they might be a perpetual teſtimony of the munificence of the crown, and an inducement to thoſe families to perſevere in that loyalty which was the original cauſe of the gift: ſo that now, whenever a perſon is tenant in tail of the gift of the crown, and the ultimate reverſion in fee continues veſted in the crown, neither a fine or re- covery, levied or ſuffered of ſuch eſtate tail, will bar the iſſue in tail, the remainder-men, or the reverſion which is veſted in the crown.

§ 11. Lord

1 Inſt. 372 *b.* § 11. Lord *Coke* has obſerved, that in the conſtruction of theſe ſtatutes, the judges have laid down the ten following rules: "1ſt, That the eſtate tail muſt be "created by a king, and not by any ſubject, albeit "the king be his heir to the reverſion, for the pre- "amble ſpeaks of gifts made to ſubjects, and none "can have ſubjects but the king; and alſo in the pre- "amble it is ſaid, (for ſervice done to the kings of the "realm), and the body of the act referreth to the "preamble, and therefore if the Duke of *Lancaſter* "had made a gift in tail, and the reverſion deſcended "to the king, yet was not that eſtate tail reſtrained by "that ſtatute, and ſo of the like. 2dly, If the king "grant over the reverſion, then a recovery ſuffered "will bar the eſtate tail, becauſe the king had no re- "verſion at the time of the recovery. 3dly, If the "king make a gift in tail, the remainder in tail, or "grant the reverſion in tail, keeping the reverſion in "the crown, a recovery againſt tenant in tail in poſ- "ſeſſion ſhall neither bar the the eſtate tail in poſſeſ- "ſion by the expreſs purview of the ſtatute, nor, by "conſequence, the eſtate in remainder or reverſion, "for that the reverſion or remainder cannot be barred, "but where the eſtate tail in poſſeſſion is barred. "4thly, If a ſubject make a gift in tail, the remain- "der to the king in fee, albeit the words of the ſta- "tute be (whereof the reverſion or remainder of the "ſame, &c.) yet ſeeing the eſtate in tail was not cre- "ated by a king, as hath been ſaid, the eſtate tail "may be barred by a common recovery. 5thly, If

"Prince

" Prince *Henry*, ſon of *Henry* the Seventh, had made " a gift in tail, the remainder to *Henry* the Seventh in " fee, which remainder, by the death of *Henry* the " Seventh, had deſcended to *Henry* the Eighth, ſo as " he had the remainder by deſcent, yet might tenant " in tail, for the cauſe aforeſaid, bar the eſtate tail by " a common recovery. 6thly, The word (remainder) " in the ſtatute, is no vain word, for the words of the " preamble be, the king hath given or granted, or " otherwiſe provided to his ſervants and ſubjects. " The word (reverſion) in the body of the act, hath " reference to theſe words, (given or granted) and " (remainder) hath reference to theſe words (otherwiſe " provided) as if the king, in conſideration of money, " or of aſſurance of land, or for other conſideration " by way of proviſion, procure a ſubject, by deed in- " dented and inrolled, to make a gift in tail to one " of his ſervants and ſubjects, for recompence of ſer- " vice or other conſideration, the remainder to the " king in fee, and all this appear of record; this is " a good proviſion within the ſtatute, and the tenant " in tail cannot by a common recovery bar the eſtate " tail; ſo it is if the remainder be limited to the king " in tail; but if the remainder be limited to the king " for years, or for life, that is no ſuch remainder as " it is intended by the ſtatute, becauſe it is of no re- " mainder of continuance, as it ought to be, as it ap- " peareth by the preamble, and it ought to have ſome " affinity with a reverſion, wherewith it is joined. " 7thly, Where a common recovery cannot bar the

" eſtate

" eſtate tail by force of the ſaid ſtatute, there a fine " levied in fee, in tail, for lives, or years, with pro- " clamations according to the ſtatutes, ſhall not bar " the eſtate tail, or the iſſue in tail, where the rever- " ſion or remainder is in the king, as is aforeſaid, by " reaſon of theſe words in the ſaid act (the ſaid reco- " very, or any thing or things hereafter to be had, " done, or ſuffered, by or againſt any ſuch tenant in " tail to the contrary notwithſtanding), which words " include a fine levied by ſuch a donee, and reſtrain- " eth the ſame. 8thly, But where a common re- " covery ſhall bar the eſtate tail, notwithſtanding " that ſtatute, there a fine with proclamation ſhall bar " the ſame alſo. 9thly, Where the ſaid latter words " of the ſtatute be (had, done, or ſuffered by or " againſt any ſuch tenant in tail), the ſenſe and con- " ſtruction is, where tenant in tail is party or privy to " the act, be it by doing or ſuffering that which ſhould " work the bar, and not by mere permiſſion, he being " a ſtranger to the act, as if tenant in tail of the gift " of the king, the reverſion to the king expectant, is " diſſeiſed, and the diſſeiſor levy a fine, and five years " paſs, this ſhall bar the eſtate tail *; and ſo if a col- " lateral anceſtor of the donee releaſe with warranty, " and

* The only authority quoted by Lord *Coke*, in ſupport of this poſition, is the caſe of *Stratfield* v. *Dover*, *Trin.* 39 *Eliz.* which is reported in 1 *Cro.* 595. 612. but no judgment was given on this point; and Juſtice *Walmſley* obſerved, that if ſuch a doctrine were admitted, it would be a common miſchief, for then tenants in tail of the

" and the donee ſuffer the warranty to deſcend without " any entry made in the life of the anceſtor, this ſhall " bind the tenant in tail, becauſe he is not party or " privy to any act, either done or ſuffered by or againſt " him. 10thly, Albeit the preamble of the ſtatute " extend only to gifts in tail, made by the kings of " *England* before the act, (*viz.* hath given and grant- " ed, &c.) and the body of the act referred to the " preamble (*viz.* that no ſuch feigned recovery here- " after to be had againſt ſuch tenant in tail) ſo as this " word (ſuch) may ſeem to couple the body and the " preamble together, yet in this caſe (ſuch) ſhall be " taken for ſuch in equal miſchief, or in like caſe; " and by divers parts of the act, it appeareth that the " makers of the act intended to extend it to future " gifts, and ſo is the law taken at this day, without " queſtion."

§ 12. As theſe ſtatutes deprive tenants in tail of the gift of the crown of all power of alienation, the judges have conſtrued them ſtrictly; and it is obſervable, that an eſtate tail of this kind is now the only perpetuity which can poſſibly be created.

§ 13. It was formerly uſual for perſons who were ſeiſed of eſtates tail of this kind, to procure the conſent of the crown to alienate them which was com-

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the gift of the crown might get themſelves diſſeiſed, in which caſe, a fine levied by the diſſeiſor, would bar the iſſue. *Vide* 1 *Sid.* 166. 1 *Roll. Rep.* 171.

monly

monly effected in this manner; the crown conveyed the reverſion to a ſubject, either in truſt for itſelf, or for the tenant in tail, by which means a fine or recovery was a good bar of the eſtate tail, according to the ſecond rule laid down by Lord *Coke*. Thus it was held by all the judges, that if the king made a gift in tail, reſerving the reverſion to himſelf, and afterwards permitted the tenant in tail to ſuffer a common recovery, by granting the reverſion to a ſtranger, in truſt, to reconvey it after the recovery was ſuffered, it would bar both the eſtate tail and the reverſion, becauſe the reverſion was once ſevered from the crown, by which means the privity of eſtate was deſtroyed; for the intention of the ſtatute was only to reſtrain common recoveries, where the reverſion always continued in the crown without any alteration. But, ſince the ſtatute 1 *Ann*, ſt. 1. c. 7. ſ. 5. this mode of evading theſe acts is effectually prevented, the crown being reſtrained by that ſtatute from alienating its poſſeſſions for a greater eſtate than three lives, or twenty-one years.

Earl of Chefterfield's Caſe, Hard. 409.

§ 14. No alteration in the limitations of an eſtate tail, whereof the reverſion continues in the crown, will enable the tenant in tail to bar his iſſue or the reverſion.

§ 15. Thus, in the caſe of the Earl of *Derby*, one of the queſtions was, Whether an eſtate tail, granted by *Richard* 3. to the *Derby* family, as a reward for ſervices, which by a private act of the 4 *Jac.* 1. was limited

Murrey v. Eyton and Price, T. Raym. 260. Pollexf. 491. 2 Show. 104. Sir T. Jones 237.

limited to the heirs-males of the family, in a different manner from that in which it had been limited by the letters patent, the reverſion ſtill continuing in the crown, was within the protection of theſe ſtatutes? And the majority of the judges in the Exchequer Chamber were of opinion, that, notwithſtanding the alterations made by the private act of parliament, as they were all within the compaſs of the old intail, and as the reverſion ſtill continued in the crown, the eſtate was within the protection of the 34 and 35 *Hen.* 8.

1 Wilſon Rep. 275.

§ 16. If a perſon conveys lands to the crown, with an intent that the crown ſhould reconvey them to the ſame perſon in tail, reſerving the ultimate reverſion to the crown, ſuch an eſtate will not be within the protection of theſe ſtatutes.

§ 17. Thus, where *William* Earl of *Derby* conveyed lands to truſtees, to the intent that they ſhould convey the ſame to queen *Elizabeth*, her heirs and ſucceſſors, that the Earl of *Derby* might accept of a grant from the crown of the ſame lands, to him and the heirs-male of his body, leaving the ultimate reverſion in the crown, which was accordingly done. It was determined, that this eſtate tail was not within the protection of thoſe ſtatutes, it being a fraudulent contrivance to create a perpetuity.

Johnſon v. Earl of Derby Pigot 201. 11 Mod. 304. 2 Show. 104.

§ 18. No eſtate tail granted by the crown, will fall under the protection of theſe ſtatutes, unleſs the grant appears to have been made as a reward for ſervices.

Perkins v. Sewell, 1 Black. R. 654. 4 Burr. 2223.

§ 19. Thus, where it was found by ſpecial verdict, that one *William Dexter*, being tenant in fee of the premiſes, enfeoffed *Henry* Earl of *Derby*, afterwards king *Henry* 4. to hold to him and his heirs. Afterwards the king, by letters patent under the duchy ſeal of *Lancaſter*, 7 *Hen.* 4. reciting the ſaid feoffment, and that *Margaret* the wife of *John Milton* was granddaughter and heir of *William Dexter*, and that *Milton* and his wife had petitioned the king to be fully re-enfeoffed thereof; *nous voulantz cele partie ſoit fait, ceo que loy, bone foy, et conſcience demandent*, have of our eſpecial grace, given and granted to the ſaid *John Milton* and *Margaret* his wife, and the heirs of the body of the ſaid *Margaret*, the ſaid premiſes to be holden as of the king and his heirs, dukes of *Lancaſter*, as of the duchy of *Lancaſter* in chief for ever, with reverſion to the king and his heirs, dukes of *Lancaſter*, on failure of iſſue of the ſaid *Margaret*. The queſtion was, Whether the intail created by the letters patent of *Hen.* 4. with the reverſion to the king in fee, was, under all its circumſtances, ſuch an eſtate tail as was protected from being barred by a common recovery, by virtue of the ſtatute 34 *Hen.* 8. c. 20.? It was inſiſted for the plaintiff, 1ſt, That no eſtate was intended to be protected by that ſtatute but ſuch as had been *given* or *provided* by the king in reward of ſome ſpecial ſervices, becauſe the preamble of the act ſpeaks only of eſtates granted upon ſuch conſiderations. 2d, That this grant appeared upon the face of it, to be merely a reſtitution of what belonged of right to the grantees; an act of juſtice, and not of bounty in the king; *ceo que loy, bone foy, et conſcience demandent*; for

for which purpoſe, it muſt be ſuppoſed, either that a legal title ſubſiſted in the grantees, paramount to the title of king *Henry* 4. by means of ſome condition or defeazance annexed to *William Dexter*'s feoffment to the Earl of *Derby*, or that *Dexter* and his heirs had an equitable right, and that king *Henry* 4. when Earl of *Derby*, was merely a feoffee to uſes. To this, it was anſwered for the defendant, 1ſt, That if the words of an enacting clauſe are wider and more extenſive than the preamble, the preamble ſhall not narrow and confine them; that though the principal purvieu of the act was, to protect ſuch eſtates tail as were granted for ſervices done, yet this was not the only reaſon. The diminution of the king's feodal rights was alſo expreſsly alleged as another reaſon, which would happen oftener by cutting off intails, and thereby preventing infancies and wardſhips. That if ſervices were indiſpenſably neceſſary to bring a grant within the protection of the ſtatute, the law would, at this diſtance of time, preſume them. That in the ſtatute of fines, 32 *Hen.* 8. c. 36. there is the ſame protection of eſtates tail, the reverſion of which is in the crown, and *in pari materia* both ſtatutes ſhould be uniformly conſtrued; that in 1 *And.* 140. and 1 *Inſt.* 373. where this ſtatute is fully explained, not a word appears, to prove that ſervices muſt be ſtated in the grant. 2d, That an intail which had laſted three hundred and ſixty years under the protection of this ſtatute, ought not now to be ſhaken by preſumptions and conjectures. Its having been ſo long unbarred, gives a preſumption, that the owners knew it was unbarrable. The firſt attempt to alter the intail was in 1652, when there was no king in being, and

all the crown lands, as well in reverſion as in poſſeſſion, were veſted in truſtees for ſale; and if the reverſion is once out of the crown, the protection is gone. 3d, That there was no ground to ſuppoſe a condition or defeazance annexed to *Dexter*'s feoffment; as the feoffment is recited, and no mention made of any defeazance or condition. 4th, That ſuppoſing the Earl of *Derby* a feoffee to uſe, which was not proved, ſtill the grant of *Henry* 4. was free and gratuitous; for as the law of uſes then ſtood, before the ſtatute 1 *Rich.* 3. c. 5. if the king, when a private man, was ſeiſed to an uſe, upon the aſſumption of the crown, the uſe was extinguiſhed, and the king became abſolute owner of the eſtate. To re-grant it to the feoffor might be generous and honourable, but was (legally ſpeaking) gratuitous. But it could not be the execution of a uſe, becauſe the king only grants an eſtate tail, reſerving the fee to himſelf; makes it a tenure *in capite*, and to be holden of the duchy of *Lancaſter*, which is quite incompatible with the idea of the Earl of *Derby*'s being merely a feoffee to uſes, which muſt have been executed in the ſame plight, as when the original feoffment was made.

Lord *Mansfield*.—" It is certain that the preamble " of a ſtatute cannot reſtrain the enacting part of it, " where the enacting part is clearly larger than the " preamble. But in this caſe, the eſtates mentioned " in the enacting part, clearly refer to thoſe in the " preamble, by the word *ſuch*, which runs through " the whole. It muſt therefore be admitted, that, in " order to obtain the protection of the ſtatute of

" *Hen.* 8. the eſtate tail muſt be of the *gift* or *proviſion*
" of the king, by way of reward. As for the ſervices,
" which are the conſideration of ſuch gift, theſe muſt,
" at a diſtance of time, be preſumed, and need not be
" proved. To take it out of the ſtatute, you muſt
" ſhew that it is not of the gift, or proviſion of the
" king. And, in the preſent caſe, it is plainly not ſo,
" upon the face of it. The petition is founded upon
" no other conſideration, than that *Elizabeth Milton*
" was couſin and heir of *Dexter*, who enfeoffed the
" Earl of *Derby*. No merits are mentioned, notwith-
" ſtanding the ſtatute 4 *Hen.* 4. c. 4. was then recent.
" The king himſelf ſtates, that he was bound to make
" the grant by *law*, *good faith*, and *conſcience*. What
" the circumſtances of the fact were, cannot now be
" diſcovered; whether a defeazance, a condition, or
" an uſe, or any thing elſe. Nor is it material to
" know. It is enough, that the king has recited ge-
" nerally, that he was *bound* to do it. It cannot,
" therefore, be a *gift*. As to the objection, that the
" king granted only a particular eſtate, and kept back
" the fee, that might be all he was bound to do. Nor
" can we reaſon very concluſively from the conduct of
" ſuch a prince as *Henry* the Fourth. He might poſ-
" ſibly do only half juſtice. Such things have hap-
" pened in later times. Lord *Angleſey*, after the Re-
" ſtoration, was obliged to reſtore the eſtates he had
" got during the rebellion in *Ireland*; yet many of the
" poor owners were glad to compound, and take
" leaſes for 99 years, inſtead of the fee. Upon the
" whole, as the eſtate was not of the king's gift, I
" think it not within the protection of the ſtatute, and

" therefore the recovery is good." Mr. Juſtice *Yates* was of the ſame opinion, and ſaid, the court would not ſtretch to enlarge the interpretation of a ſtatute, which prohibits the natural right of alienation by tenant in tail.

Reverſions veſted in the Crown. Pigot 85. Neale v. Wilding, 1 Wilſ. R. 275.

§ 20. Before the ſtatute *de Donis*, when the king created a conditional fee, there remained nothing in the crown but a bare poſſibility, and if the donee had iſſue, and afterwards aliened, the king's poſſibility was barred as well as that of the ſubject. After the ſtatute *de Donis* had turned that poſſibility into a reverſion, and after common recoveries were allowed to be common aſſurances, and to bar remainders and reverſions, it became a queſtion how far a recovery could bar a remainder or reverſion veſted in the king; and it was determined by the judges, that though a recovery ſuffered by a tenant in tail barred the eſtate tail, yet it would not affect any intereſt which the king had in the remainder or reverſion; as they did not venture to aſſert that the crown could be deprived of any part of its revenue, under pretence of a recompence in value, which was merely imaginary.

Plowd. 553.

Pigot 85.

§ 21. Mr. *Pigot* ſays, it is *vexata queſtio* how far at common law a remainder veſted in the king, was deveſted by recovery and diſcontinuance, but he afterwards admits, that neither a fine nor recovery can deveſt any eſtate in remainder or reverſion out of the king. He then ſays, that if a recovery be on good title againſt tenant in tail, and the king has the remainder by a defeaſible title, there it ſhall deveſt the remainder

Plowd. 553.

out

out of the king, and reſtore and remit the right owners. This poſition is founded on the determinations in *Wiſeman*'s caſe 2 *Rep.* 15. and *Cholmeley*'s caſe *id.* 50. where the court determined, that the limitation of the reverſion to the crown was void, and, therefore, that ſuch reverſion was barred by a recovery; but it was admitted, that if the reverſion had been veſted in the crown, it could not have been barred.

§ 22. The only mode of acquiring a good title to an eſtate tail, whereof the reverſion is in the crown, is by an act of parliament, enacting that the reverſion ſhall be diveſted out of the crown and veſted either in the tenant in tail, or in ſome other private perſon, by which means it becomes barrable by a recovery. Vide 30 G. 3. ch. 51.

§ 23. By the ſtatute 21 *Hen.* 8. c. 15. it is enacted, that no eſtate held by ſtatute-merchant, ſtaple, or elegit, ſhall be barred by a common recovery. Tenants by Elegit, &c.

§ 24. By the ſtatute 11 *Hen.* 7. c. 20. no eſtate held by a woman in dower, or as a jointure, can be barred by a recovery ſuffered by ſuch woman. Eſtates held in Dower, &c. Ante ch. 8. ſ. 22.

TITLE XXXVI.

RECOVERY.

CHAP. XIV.

How Recoveries may be reverſed or falſified.

§ 1. *Writ of Error.*
4. *Who may bring this Writ.*
10. *No Averment againſt the Record.*
15. *The Parol does not demur for Infancy.*
17. *There muſt be a Writ of* Scire Facias.
20. *A Releaſe of Errors from the Common Vouchee not good.*
22. *Writs of Error muſt be brought within Twenty Years.*
25. *Of falſifying a Recovery.*
30. *A Tenant for Years may falſify.*
33. *Courts of Equity.*

Section 1.

Writ of Error. Fines ch. 14. f. 1.

THE judgment obtained in a common recovery, being a matter of record, and ſimilar in almoſt every reſpect to a judgment given in an adverſary ſuit, can only be reverſed by a writ of error.

Id. f. 3.

§ 2. A writ of error to reverſe a common recovery muſt be brought in the Court of King's Bench, unleſs the error is in the proceſs, in which caſe it may be reverſed in the Court of Common Pleas.

§ 3. By the ſtat. 34 and 35 *Hen.* 8. c. 26. f. 113. it is enacted that all judgments given at the Great Seſſions in *Wales*, ſhall be redreſſed by writ of error returnable in the Court of King's Bench in *England.*

§ 4. No

§ 4. No perſon has a right to bring a writ of error for the purpoſe of reverſing a common recovery, unleſs he had an immediate intereſt in the lands, whereof the recovery had been ſuffered. Who may bring this Writ.

§ 5. Thus where a writ of error was brought in the Court of King's Bench to reverſe a common recovery, and judgment was obtained thereon; but it appearing afterwards that the plaintiff in error had no immediate title to the lands, there being a remainder-man before him, the court reverſed their former judgment of reverſal. Anon. 5 Mod. 396.

§ 6. The right to bring a writ of error deſcends to the perſon to whom the land would have deſcended in caſe the recovery had not been ſuffered.

§ 7. *Thomas Henningham* being ſeiſed to him and the heirs-male of his body, had iſſue *Henry* and three daughters by his firſt wife, and *Arthur* and two other ſons by his ſecond wife. Upon the death of *Thomas Henningham*, *Henry* his eldeſt ſon entered, and ſuffered a common recovery, and afterwards died without iſſue. *Arthur* the ſecond ſon brought a writ of error to reverſe this recovery, to which it was objected that he was only of the half blood. The court however determined that the right to bring a writ of error deſcended to the perſon who would have been intitled to the land, if no recovery had been ſuffered. Henningham v. Windham, 1 Leon. 261.

§ 8. In the caſe of *Sheepſhanks* v. *Lucas* which has been already ſtated, an objection was made to the writ of Ante ch. 5. ſ. 14. 1 Burr. 412.

of error, becauſe the plaintiff did not ſhew how his title aroſe. But the court ſaid, that a complete title need not be ſet forth in a writ of error; it was only required of the plaintiff in error to ſhew the connection and privity between the perſon againſt whom the recovery was had, and the perſon who brings the writ of error; for it was not like a proceeding to try the right of land, or to recover the land itſelf.

Marquis of Winchester's Caſe, 3 Rep. 1.

§ 9. The right of bringing a writ of error to reverſe a common recovery does not paſs to the crown on an attainder for high treaſon. A tenant in tail ſuffered a common recovery, the remainder-man was attainted of treaſon and executed; and by Act of Parliament forfeited to the king all his manors, *&c.* reverſions, remainders, uſes, poſſeſſions, offices, rights, conditions, and all other his hereditaments. The recovery being erroneous the king brought a writ of error to reverſe it. Adjudged that the writ was not given to the king by any words in the act of forfeiture, the party having no right of entry, but only a right of action which did not paſs by thoſe general words. But admitting the writ of error had paſſed to the king by the words of the act, yet it would not paſs from him to a patentee by a general grant of the manor *cum pertinentiis*, and of all the intereſt, claim and demand therein, notwithſtanding the clauſe *de ſpeciali gratia.* For if the king could grant it, it muſt be by virtue of his prerogative (for no common perſon could do it) and then it ought to be by expreſs and preciſe words.

§ 10. The

§ 10. The errors assigned in a recovery may either be in fact, or in law; but nothing can be assigned for error in a common recovery which contradicts the record; it follows from this principle that no incapacity in a vouchee can be assigned for error, where he appeared in person; but if a vouchee appears by attorney, an averment may then be made, either that such vouchee died before the day on which judgment was given, or that he laboured under some personal disability which rendered him incapable of suffering a common recovery.

No Averment against the Record. Tit. 35. ch. 2. f. 54.

§ 11. Thus in the case of *Wynne* v. *Wynne*, one of the questions was, whether the plaintiff in error was not estopped to assign the death of the vouchee to have happened on the 10th of *May*, which was before judgment, when it appeared upon the face of the record, that she appeared by attorney on the return day of the writ of summons which was the 16th of *May*. The court were clearly of opinion that the death of the vouchee before judgment, was not contrary, but a matter collateral to the record, and properly assignable for error, and triable by a jury; for all the record said was, that the vouchee appeared by her attorney; it did not say any thing of her actual existence at the time, but put a matter in issue, which was properly triable by the country.

Ante, ch. 5. f. 13. 1 Wils. Rep. 42.

§ 12. In a writ of error to reverse a common recovery, the error assigned was, that the vouchee was within age and appeared by attorney. All the court agreed

Holland v. Dauntzey, Cro. Eliz. 739.

agreed that this circumſtance might well be aſſigned for error after the death of the vouchee.

Ante ch. 8. f. 9.

§ 13. So in the caſe of *Stokes* v. *Oliver* an averment was allowed, that the vouchee, who appeared by attorney, was an infant, and the recovery was reverſed.

§ 14. No caſe has ariſen where an averment of ideocy has been made againſt a vouchee who appeared by attorney, but in a late caſe which was determined in the Houſe of Lords in *Ireland*, ſuch an averment was held to be good, and not contrary to the record.

Vide the Appendix.

The Parol demurs for Infancy.

§ 15. In a writ of error to reverſe a common recovery the parol ſhall demur for the infancy of the tenant.

Aland v. Malone, Fitz. R. 114.

§ 16. In a writ of error of a judgment in the King's Bench in *Ireland*, the caſe was that in a writ of error to reverſe a common recovery the defendant pleaded that he was an infant and prayed that the parol might demur. To this the plaintiff demurred, and judgment was given that the parol ſhould demur. The judgment was affirmed. Note, to the writ of error in this court, the defendant again pleaded his infancy and prayed the parol might demur, which was diſallowed. *Non datur enim exceptio ejuſdem rei cujus petitur diſſolutio.*

There muſt be a Writ of *Scire Facias.* Lord Pembroke's Caſe, Rep. Temp. Holt 614.

§ 17. A recovery ought not to be reverſed, unleſs writs of *ſcire facias* are iſſued againſt the terre-tenants and the heir; becauſe the errors in a recovery ought not

not to be examined until all the parties intereſted in ſupporting it, be before the court.

§ 18. The iſſuing writs of *ſcire facias* to the terre-tenants is not deemed to be *ex neceſſitate juris*, but only diſcretionary in the court.

§ 19. Thus on a motion in the Court of King's Bench to ſet aſide a judgment of reverſal of a common recovery on a writ of error brought there, becauſe there was no *ſcire facias*, to the terre-tenants. It was ſtrongly debated and on all hands agreed to be very inconvenient, that a *ſcire facias* ſhould not be to the tenants, for otherwiſe a purchaſer might be deprived of his aſſurance without notice. There was urged that the terre-tenant cannot be party to the writ of error. That they had a record exemplified of the reverſal. That the reverſal was in 35 *Car.* 2. That the want of a writ of *ſcire facias* muſt be error either in law or in fact, it would not be error in law, for that muſt appear upon the record itſelf, which it did not here. It could not be error in fact, becauſe there was no neceſſity for ſuch a writ, it was only diſcretionary in the Court and not *ex neceſſitate juris*. The Court was of opinion that the awarding writs of *ſcire facias* to the terre-tenants was diſcretionary. And in a ſubſequent caſe Lord *Mansfield* ſaid that by the eſtabliſhed mode of proceeding there muſt be a *ſcire facias* againſt the terre-tenants, otherwiſe it is an irregularity, but no more.

Kingſton v. Herbert, 2 Show. 490. 2d Edit. 3 Mod. 119.

Hall and Ux. v. Woodcock, 1 Burr. 359.

§ 20. A releaſe

A Releaſe of Errors from the Common Vouchee not good.

§ 20. A releaſe of errors from the common vouchee cannot be pleaded in bar of a writ of error to reverſe a common recovery.

Lord Norrice v. Marquis of Wincheſter, Cro. Eliz. 2.

§ 21. In a writ of error to reverſe a common recovery the defendant pleaded a releaſe of all errors by the laſt and common vouchee. It was reſolved by all the Judges that ſuch releaſe could not be pleaded, for the common vouchee is put in only for form, and in truth he renders nothing, and therefore it is againſt reaſon that his releaſe ſhould bar others that have the loſs, and are entitled to have remedy by the reverſal of the judgment.

Writs of Error muſt be brought within 20 Years.

§ 22. By the ſtatute 10 & 11 *W.* 3. c. 4. reciting that fines, recoveries, and judgments, were reverſible at any time without reſtraint or limitation for any error or defect which happened therein, by the ignorance or careleſſneſs of clerks, and ſometimes by unavoidable accidents, it is enacted, § 1. "That no fine or "common recovery, *&c.* ſhall be reverſed or avoided "for any error or defect therein, unleſs the writ of "error or ſuit for the reverſing of ſuch fine, recovery, "*&c.* be commenced or brought and proſecuted with "effect within twenty years after ſuch fine levied, or "ſuch recovery ſuffered. § 2. Provided always that "if any perſon who ſhall be intitled to any ſuch writ "of error as aforeſaid ſhall at the time of ſuch title "accrued be within the age of twenty-one years or "covert, *non compos mentis*, impriſoned or beyond the "ſeas, then ſuch perſon, his or her heirs, executors "or adminiſtrators (notwithſtanding the ſaid twenty

" years expired) ſhall and may bring his, her, or their " writ of error for the reverſing any ſuch fine, reco- " very, *&c.* as he, ſhe, or they might have done in " caſe this act had not been made, ſo as the ſame be " done within five years after his or her full age, diſ- " coverture, coming of ſound mind, enlargement out " of priſon, or returning from beyond the ſeas, or " death, but not afterwards or otherwiſe."

§ 23. In conſequence of this ſtatute a writ of error to reverſe a fine muſt be brought within twenty years after the fine has been levied, and not within twenty years after a title has accrued; for the time when the fine was levied is the period from which the twenty years are to be reckoned.

§ 24. A writ of error was brought 19 *Geo.* 2. to reverſe a common recovery which was ſuffered in 5 *Ann.* The defendant pleaded this ſtatute in bar, the writ of error not having been brought within twenty years after the recovery was ſuffered, to which it was anſwered that the plaintiff's title did not accrue until the death of one of the vouchees without iſſue in the year 1739.—After ſeveral arguments the court determined that the writ of error did not lie; becauſe the ſtatute 10 & 11 *W.* 3. was made to quiet poſſeſſions, and to fix a certain period beyond which fines and recoveries ſhould not be impeached, for the words of the ſtatute are expreſs, " twenty years after ſuch " fine levied or recovery ſuffered." And it has not the words which are in the ſtatute of fines, *viz.* after the title accrued. The *terminus a quo* is the time when

Lloyd v. Vaughan, 2 Stra. 1257.

when the recovery is ſuffered, and if that was once exceeded, there would be no knowing where to ſtop; a reverſioner after an eſtate tail which had ſubſiſted above a century might upon this principle be allowed to reverſe a common recovery, whereas perſons in reverſion were never the objects of the legiſlature's care. It was ſufficient that they had a chance of the reverſions veſting with the twenty years, in which caſe they might bring a writ of error but not afterwards.

Of falſifying a Recovery.

§ 25. As a common recovery can only be reverſed by a writ of error or ſome proceeding of a ſimilar nature, to which none are intitled but thoſe who have an immediate intereſt in the lands; the law allows all ſtrangers whoſe intereſts are affected by a recovery to falſify it.

Pa. 77. Figot 156.

It is laid down by *Booth* in his Law of Real Actions, that a recovery may be falſified ſeveral ways. 1. By entry and plea. 2. By action. 3. By action and plea, and 4. By plea only.

§ 26. By entry and plea, when the party's entry is not taken away by the recovery and he brings an aſſiſe, and the recovery is pleaded againſt him, then he pleads matter to avoid the recovery. It follows from theſe principles, that a common recovery may be invalidated on a trial in ejectment; for if a recovery is given in evidence and ſet up by way of defence, the plaintiff may ſhew any defect in the recovery, and if the court is of opinion that the recovery is void and

and the plaintiff intitled to recover, ſuch recovery is completely falſified as to that action.

§ 27. Thus in the caſe of Sir *Butler Wentworth*, which was tried at the bar of the Court of Common Pleas in *Mich. Term* 1744, evidence of weakneſs of underſtanding was admitted to invalidate the deed, by which a tenant to the *præcipe* was made for the purpoſe of ſuffering a common recovery, and the effect of the recovery was by that means defeated. 1 Vezey 403; 3 Atk. 313.

§ 28. So in the caſe of *Jones, ex dem. Hale* v. *Cave*, tried at *Hereford* at the *Lent* Aſſizes 1765, by Sir *John Eardley Wilmot*, evidence was admitted to prove the weakneſs of underſtanding of the vouchee in a common recovery, who appeared by attorney, and the recovery was by that means invalidated. A motion was made the next term for a new trial, on account of miſdirections of the judge, and it was contended that ſuch evidence ought not to have been admitted; but the motion was refuſed.* Vide Appendix.

§ 29. A recovery may alſo be falſified by action and plea, when the entry of the party that has right is taken away by the recovery, and upon a real action brought, the recovery is pleaded in bar of his right. This may be falſified by plea. Booth 77. 6 Rep. 8 *b*.

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* The caſes of *Dormer* v. *Parkhurſt*, *Goodtitle* v. Duke of *Chandos*, and *Taylor* v. *Horde*, which have been ſtated in the former part of this volume, are inſtances of recoveries falſified in ejectment.

A Tenant for Years may falſify. 1 Inſt. 46 *a.*

§ 30. By the Common Law, if the tenant of the freehold had ſuffered a common recovery, it operated as a good bar to all terms for years derived out of the freehold; for the perſon who recovered the lands was ſuppoſed to come in by a title paramount, ſo that he was not bound by the leaſes of the perſon againſt whom he recovered: beſides, a termor for years could not in any caſe falſify a common recovery. Plowd. 83.

§ 31. By the ſtatute of *Glouceſter*, 1 *Edw.* 1. c. 11. a remedy was given to the leſſee for years, by way of receipt and trial, whether the recovery was upon good title, or by way of colluſion; and in caſe it appeared that the recovery was by colluſion, then the leſſee for years was permitted to enjoy his term, and the execution was ſtaid until the determination of the term.

Bro. Ab. Tit. Leaſe 26. Fitz. N. B. 198 and 220. Vaugh. 127.

§ 32. The operation of this ſtatute not having been found ſufficiently extenſive, another act was made 21 *Hen.* 8. c. 15. whereby it was provided that a tenant for years might falſify a feigned recovery had againſt the perſon in reverſion, and that no eſtate held by ſtatute merchant, ſtaple, or elegit, ſhould be avoided by means of any feigned recovery.

Courts of Equity.

§ 33. Although a common recovery can only be reverſed by the Court of Common Pleas in the firſt inſtance, and by the Court of King's Bench upon a writ of error from the Court of Common Pleas, yet the Court of Chancery can, in fact, invalidate a com-

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mon recovery, where it appears to have been obtained by fraud or impoſition, by compelling the recoveror to convey the eſtate to the perſon who is intitled in equity to have it, or by declaring the recoveror to be a truſtee for ſuch perſon. Tit. 35. c. 14. ſ. 64.

§ 34. Where a perſon who was deaf and dumb ſuffered a common recovery of intailed lands, aſſiſted by his uncle, and then ſettled the ſame to certain uſes. Upon the circumſtances of the caſe it appeared he had done nothing but what in conſcience he ought to have done, yet being under theſe circumſtances, the Lord Chancellor ſaid he ought to be taken care of in equity, and it appearing that the uncle was concerned in point of intereſt, the ſettlement was ſet aſide. But had he been aſſiſted by an able and faithful relation that was not intereſted, equity would not have relieved him in ſo reaſonable an act as this appears to be. Ferres v. Ferres, 2 Ab. Eq. 695.

§ 35. A Court of Equity will alſo reſtrain the operation of a common recovery to thoſe purpoſes for which it was intended, and will not allow it to have a more extenſive effect.

§ 36. Where a father on his ſon's marriage, by leaſe and releaſe conveyed lands to truſtees and their heirs, to the uſe of the father for life, remainder to his wife for life, remainder to the ſon for ninety-nine years, if he ſhould ſo long live, remainder to truſtees during his life to ſupport contingent remainders, re- Stanhope v. Thacker, Prec. in Cha. 435.

mainder to the ſon's intended wife for life for her jointure, remainder to the firſt and every other ſon of that marriage in tail male, remainder to the daughter or daughters of that marriage and the heirs of their bodies, till they ſhould, out of the rents, iſſues and profits, have received 3000 *l.* remainder to the heirs of the body of the ſon, remainder to the ſecond ſon of the father, and to his firſt and other ſons, remainder to the right heirs of the ſon for ever. The marriage took effect, and they had only two daughters, who being in poſſeſſion after all the other eſtates determined, which were precedent, ſuffered a recovery to the uſe of themſelves and their heirs; and one queſtion in this caſe was, whether by this recovery the remainders were not barred. And it was argued that they were, becauſe the primary intention of this limitation was to make them tenants in tail, and the raiſing of the 3000 *l.* was but a ſecondary intention thereof, and when they being ſo tenants in tail, ſuffered a recovery, this barred their eſtate tail, and the remainders depending thereon; but the Lord Chancellor was clear of opinion, both upon the firſt ſpeaking to it, and the next day after, that this was but in the nature of a ſecurity for the 3000 *l.* and though the recovery barred the eſtate tail and remainders at law, yet the daughters were but in the nature of truſtees (after the 3000 *l.* raiſed) for thoſe in remainder; that before the recovery they had but an eſtate tail for their ſecurity for that ſum; that after the recovery they had the fee ſimple; but ſtill the ſame in a Court of Equity was but a ſecurity till that money

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was raiſed; that thoſe in the remainder had the equity of redemption in the ſame manner as the perſon who made that ſecurity would have had if no ſuch limitation in remainder had been; that therefore they might at any time, by paying off that 3000 *l.* determine the eſtate of the daughters, and then the daughters would be but truſtees for them.

APPENDIX to Title XXXVI.

RECOVERY.

HOUSE of LORDS of Ireland, 1785.

Guſtavus Hume Eſquire, Plaintiff in Error.
William Burton Eſquire, Defendant in Error.

A WRIT of error was brought in the Court of King's Bench in Ireland, to reverſe a common recovery, ſuffered by *Nicholas* Earl of *Ely* in 1767, in which he appeared by attorney, (having acknowledged a warrant of attorney before the Lord Chief Juſtice of the Common Pleas for that purpoſe): and the error aſſigned was, that the Earl of *Ely* was of unſound mind. Iſſue being found upon this fact, the plaintiff in error offered to produce evidence of the incapacity of the ſaid Earl; but the counſel for the defendant inſiſted, that the acknowledgment of the warrant of attorney before the Chief Juſtice was a judicial act and matter of record, and was concluſive evidence of the ſaid Earl's ſanity. The court was of opinion, that the evidence could not be admitted. A bill of exceptions was tendered, and a writ of error brought in the Houſe of Lords of *Ireland*, where the following queſtion was put to the judges: "Whether, in a caſe where the "vouchee in a common recovery appears by attorney, "the caption of the warrant of attorney, appointing "ſuch

" ſuch attorney, appearing upon the record to be taken " by the Chief Juſtice of the Common Pleas out of " court, was concluſive evidence of the capacity of " ſuch vouchee, as to the ſoundneſs of his mind to " make ſuch attorney and to ſuffer ſuch recovery ?"

The judges were divided: but the majority were of opinion, that the caption of the warrant of attorney, appearing on the record to be taken by the Chief Juſtice out of court, was not concluſive evidence of the capacity of the vouchee. Whereupon, it was ordered and adjudged, that the judgment given in the court of King's Bench ſhould be reverſed; and that the verdict ſhould be ſet aſide and annulled; and that the parties ſhould proceed to a new trial upon the iſſue joined between them, as in the ſaid record.

A new trial was had, when the plaintiff's counſel offered to give parol evidence, to prove the fact upon which the iſſue was joined; but the counſel for the defendant inſiſted, that the plaintiff ought not to be allowed to go into ſuch evidence, as they, on the part of the defendant, had evidence of record to produce, which was concluſive to the fact in iſſue, and, therefore, could not be controverted; (that is to ſay), a commiſſion iſſued out of the Court of Chancery, to try the ſanity of the ſaid *Nicholas* Earl of *Ely*, and the inquiſition taken in conſequence of ſuch commiſſion, by which it was found, that the ſaid *Nicholas* Earl of *Ely* was not an ideot, or a perſon of unſound mind; and alſo a fine, with proclamations, levied of the lands of which the recovery, ſought to be impeached, had

been ſuffered and taken before the Chief Juſtice of the Common Pleas on the ſame day, on which the warrant was acknowledged; which fine was levied to *Henry Loftus*, for the purpoſe of making him tenant to the *præcipe* in that recovery. The court being of opinion, that this was the proper mode of proceeding, the defendant's counſel accordingly gave in evidence to the jury the ſaid commiſſion and inquiſition, finding that *Nicholas* Earl of *Ely* was not an idiot, or perſon of unſound mind, and alſo a fine with proclamations, levied by the ſaid *Nicholas* Earl of *Ely* of the lands, &c. in the ſaid recovery, to *Henry Loftus*, for the purpoſe of making him tenant to the *præcipe*, and which was taken by the Lord Chief Juſtice of the Court of Common Pleas on the 8th of *July* 1767, being the ſame day on which the acknowledgment of the warrant of attorney was taken by the ſame Chief Juſtice. And the counſel alſo gave in evidence the warrant of attorney, and the caption thereof. And the defendant's counſel thereupon inſiſted, that the ſaid inquiſition, finding that *Nicholas Hume* Earl of *Ely* was not an idiot or perſon of unſound mind, had for ever concluded that queſtion. That the fine and recovery were both before the court; that the fine was of the ſame lands, and paſſed the ſame eſtate on the ſame day to the tenant to the *præcipe* in the recovery, on which the warrant of attorney was acknowledged, and that it conſtituted part of the ſame aſſurance; that the fine gave and was meant to give operation to the recovery, and that, without it, the recovery would have been a mere nullity; that, therefore, there was a maſs of evidence, concluſive as to the ſanity of *Nicholas* Earl of *Ely*, and

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of a nature not to be controverted, laid before the court; and that no parol evidence could or ought to be received on the part of the plaintiff, as to the iſſue depending.

The court having declared it to be their opinion, that the ſaid fine, *præcipe*, and concord, together with the caption of the ſaid fine, as likewiſe the ſaid warrant of attorney, and the caption thereof, were concluſive evidence of the ſanity of the ſaid Earl of *Ely* upon the ſaid iſſue; a verdict was therefore found for the defendant, and judgment given thereon by the Court of King's Bench, "that the judgment of the Court of "Common Pleas ſhould be in all things affirmed, and "remain in full force and effect, notwithſtanding the "cauſes aſſigned for error."

A bill of exceptions was taken to the opinion of the court; and a writ of error was brought in the Houſe of Lords, where the following queſtions were put to the Judges:

1ſt, Whether the commiſſion ſet forth in the ſaid record, and the inquiſition thereon, whereby it was found that *Nicholas Hume* Earl of *Ely*, in the ſaid commiſſion named, was not, at the time of taking the ſaid inquiſition, an idiot, or a perſon of unſound mind, with the return of the execution of the ſaid commiſſion, which were given in evidence on the part of the defendant in error on the trial of the iſſue at the bar of the Court of King's Bench, in *Michaelmas* term, in the year 1784, joined upon the averment taken by

the plaintiff in error in the ſaid cauſe, was, in point of law, concluſive evidence of the ſanity of the ſaid *Nicholas Hume* Earl of *Ely*, at the time of taking the warrant of attorney ſet forth in the preſent record, and of his capacity at that time as to the ſoundneſs of his mind, to make ſuch warrant of attorney, and ſuffer ſuch recovery, as in the ſaid record; ſo as to juſtify the ſaid Court of King's Bench in refuſing, upon the trial of the aforeſaid iſſue, to ſuffer the plaintiff in error to go into parol evidence offered by him to prove that the ſaid *Nicholas* Earl of *Ely*, was of unſound mind at the time of the ſaid warrant taken and acknowledged, and the ſaid recovery ſuffered?

2d, Whether the commiſſion and the inquiſition and return thereon, whereby it was found that *Nicholas Hume* Earl of *Ely*, was, at the time of taking the ſaid inquiſition, not an idiot or a perſon of unſound mind, together with the fine, *præcipe*, concord, and caption of the ſaid fine, as likewiſe the warrant of attorney and the caption thereof, on the 8th day of *July* 1767, as ſet forth in the ſaid record, and what part of the ſaid evidence were, in point of law, concluſive evidence upon the iſſue, which came on to be tried at the bar of the Court of King's Bench, of the ſanity of the ſaid *Nicholas Hume* Earl of *Ely*, and of his capacity as to the ſoundneſs of his mind to make ſuch warrant of attorney, and ſuffer ſuch recovery, as in the preſent record, iſſue having been joined upon the averment taken by the plaintiff in error on the ſaid cauſe, after the death of the ſaid *Nicholas*, and the ſaid warrant of attorney and caption thereof ſet forth in the record, appearing

appearing to have been made and acknowledged before the ſaid Chief Juſtice of the Court of Common Pleas, at the ſame time that the caption of the ſaid fine was taken and acknowledged by and before him, and it appearing to the ſaid court upon the ſaid record, that the tenant to the *præcipe* in the ſaid recovery was made by fine, levied and acknowledged by the ſaid *Nicholas*, ſo as to warrant the ſaid Court of King's Bench, in refuſing upon the trial of the aforeſaid iſſue to permit the plaintiff in error to go into parol evidence, offered by him to prove that the ſaid *Nicholas* was of unſound mind at the time of the ſaid fine taken, and warrant of attorney acknowledged, and recovery ſuffered?

3d, Whether, in caſe where a fine with proclamations is levied by tenant in tail, and the *præcipe* is brought in the ſame term againſt the conuſee of ſuch fine, and a common recovery ſuffered thereupon, ſuch fine, *præcipe*, and common recovery, are to be conſidered in law as one common aſſurance or conveyance, or as ſeparate common aſſurances or conveyances.

As to the firſt queſtion, the judges were unanimouſly of opinion, that the commiſſion and inquiſition were not concluſive evidence of the ſanity of *Nicholas* Earl of *Ely*. As to the ſecond queſtion, four of the judges were of opinion, that the acknowledgment of the fine was not concluſive evidence of the ſanity of *Nicholas* Earl of *Ely*, and three of the judges were of a contrary opinion. And as to the third queſtion, the Judges were unanimouſly of opinion, that the fine and recovery were to be conſidered as one aſſurance.

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The judgment of the Court of King's Bench was affirmed.

The author has been favoured with the following accurate note of Lord Chief Baron *Yelverton*'s argument in this caſe. And as his Lordſhip's opinion coincided with that of the majority of the Judges, and alſo of the Lord Chancellor, it is preſumed, that it muſt prove extremely acceptable to the profeſſion.

Lord Ch. Baron Yelverton.

The Court of King's Bench has determined, and the Judges have all agreed, that the inquiſition finding *Nicholas* Earl of *Ely* not to have been an idiot, or of unſound mind, is not concluſive evidence of his ſanity at the time of acknowledging the warrant of attorney mentioned in the queſtion: your Lordſhips have determined that the warrant of attorney is not in itſelf concluſive evidence of the ſanity of Lord *Ely*, at the time of acknowledging ſuch warrant; but that it is a matter in *pais*, and triable by a jury: the only remaining queſtion, therefore, is, whether the fine be concluſive evidence of his ſanity, at the time of acknowledging the warrant. The fine, I do admit, is *quaſi* a judgment, and, in that light, I will beg leave to conſider it; but it is not therefore concluſive evidence of the ſanity of the conuſor, to do another act.—In what caſes judgments ſhall conclude either as pleas or as evidence, is no where better defined than in that learned argument of Lord Chief Juſtice *De Grey*, in the Ducheſs of *Kingston*'s caſe: "Firſt, that the judgment "of a court of concurrent juriſdiction, directly upon "the point, is as a plea, a bar, or as evidence, con-

State Trials, vol. 11. p. 261.

"cluſive

" cluſive between the ſame parties, upon the ſame " matter, directly in queſtion in another court. Se- " condly, that the judgment of a court of excluſive " juriſdiction, directly upon the point, is, in like man- " ner, concluſive, upon the ſame matter, between the " ſame parties, coming incidentally in queſtion, in " another court, for a different purpoſe. But neither " the judgment of a concurrent or excluſive juriſdic- " tion is evidence, of any matter which came colla- " terally in queſtion though within their juriſdiction; " nor of any matter incidentally cognizable; nor of " any matter to be inferred by argument from the " judgment."

Theſe rules are laid down with ſo much preciſion and accuracy, that there is not a word contained in them which has not its ſterling value; nor has a caſe been cited, nor do I believe a caſe can be put, which does not fall within them; for either they are caſes, where acts of parliament have eſtabliſhed excluſive juriſdiction, between certain parties, as the certificates of commiſſioners for ſettling army accounts, or the proof of debts before commiſſioners of bankrupts under the controul of the great ſeal, or ſentences in matrimonial cauſes annulling a marriage, where one of the parties, in a civil ſuit, claimed a title, or founded a defence upon ſuch marriage; or ſentences of excluſive juriſdiction, acting directly in *rem*, and to which all the world are ſuppoſed to be parties, as condemnations in the Court of Exchequer, which are had by public proclamations, inviting all perſons whatſoever to come in and claim their property, or the ſentences of Admi-

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ralty courts, which judge between nation and nation, and from whoſe deciſion there lies no appeal but to the ſword. But, in all theſe caſes, the parties to the ſuits, or the parties againſt whom the evidence was received, were parties to the ſentences, and had acquieſced under them, or derived under thoſe who had; or they were ſentences in ſuits to which all perſons were or might have been parties.

Now, if a fine were like an ordinary judgment of a court of competent juriſdiction, it would not be concluſive evidence in the preſent inſtance, and for theſe reaſons; becauſe there is no act of parliament which has made a fine under theſe circumſtances concluſive againſt a remainder-man; the remainder-man does not claim under the fine, he never could be ſaid to acquieſce under it, becauſe he could not impeach it, he is no party to it, nor does he claim under any man who is. And though I muſt acknowledge that fines do in ſome reſpects ſtand on a ground peculiar to themſelves, a ground whereon the wiſdom of our anceſtors hath placed them, for the aſſurance of titles, and quieting of poſſeſſions; yet I muſt ſay that, that memorable act, which gives to fines their preſent force and efficacy, which directs their operation, and where they operate, has made them irreſiſtible, does not in any of its proviſions materially depart from thoſe rules, under which other judgments have been held to be concluſive: for the effect of that act is two-fold. Under that act a fine with proclamations, by tenant in tail, whether the proclamations are finiſhed in his life-time or not, will bar the iſſue in tail. But why?

becauſe the fine is *quaſi* a judgment, and the iſſue in tail claims the eſtate through his anceſtor, whoſe right was barred by the judgment.—Again by that ſtatute, a fine, with proclamations, if five years after the title accrued are ſuffered to paſs without claim, will bar every man who does not come within the ſavings of that act. But why? becauſe there the fine acts, *quaſi in rem*, for by the proclamations, all men are invited to claim, if any right they have, and having failed to do ſo, within the time preſcribed by law, they are therefore barred. But the caſe of the plaintiff in error does not fall within either of theſe concluſions, for he is not the iſſue in tail of the conuſor of the fine; nor is the fine produced againſt him, as a judgment to bar his right. If the defendant in error intended to make that uſe of it, he ought to have pleaded it to the writ of error, and have given the plaintiff an opportunity of replying that he claimed within the five years, or that he came within the ſavings of the act. The fine is therefore offered, not as a bar to the right of the plaintiff in error, by its own force, but as concluſive evidence of the ſanity of a conuſor to do another act, which is a bar to his right. And ſo, though it does not bar the right, it takes away the remedy; and though it would not conclude, if pleaded as a judgment, yet, when offered as a piece of evidence, it ſhall have the magic virtue of ſealing up the lips of the court and the jury, the parties and the witneſſes.—But I know of only one caſe, where it has been held that a fine is concluſive to the capacity of the conuſor to do another act, and this is the caſe of a fine and a deed leading the uſes of that

that fine. In that caſe, it has certainly been held for law, that a man whoſe right is by law barrable by a fine, ſhall not be received to aver againſt the capacity of the conuſor to execute the deed; becauſe it is ſaid, the fine is the principal, and the deed the acceſſary; and a man who is enabled to do the principal, ſhall not be held diſabled to do the acceſſary. But that rule of law was adopted through neceſſity, becauſe all fines operate to uſes, and uſes are governed by the intent. Whereas if the deed were avoided, the fine would no longer operate to the uſes to which it was intended to enure, and ſo the fine would in effect be avoided, becauſe the uſes of it could not take place. But to apply that rule to the caſe of a fine and recovery, it would be neceſſary to eſtabliſh two poſitions, neither of which is true. Firſt, that the fine is the principal, and the recovery the acceſſary; and, ſecondly, that if you avoid the recovery, you alſo avoid the fine. But there is not a ſingle ſaying in the books, that the fine is the principal, and the recovery the acceſſary; for the only uſe of making the tenant to the *præcipe* by fine, is, to put the evidence of there being a good tenant to the *præcipe* on record; and though you ſhould avoid the recovery, the fine will nevertheleſs ſtand, for the writ of error does not impeach, nor will the judgment reach it. And *vice verſâ*, though the fine ſhould be hereafter avoided, yet the recovery would not be thereby avoided, if it were otherwiſe good. And with reſpect to a recovery, and a deed leading the uſes of a recovery, the law is the very reverſe of what it is in the caſe of a fine, and a deed leading the uſe of a fine. In the caſe of a

recovery

recovery and deed, the deed has in more inſtances than one been held to be the principal, and the recovery the acceſſary; and accordingly a party, whoſe right would be otherwiſe barred by the recovery, has been allowed to impeach the ſanity of the vouchee, at the time of the execution of the deed, and ſo avoid the operation of the recovery.—But it ſeems to be conceived that there is a ſomething or other in this caſe, which diſtinguiſhes it out of the ordinary rules of law. I will therefore beg leave to examine, what that ſomething is, by applying myſelf immediately to the interrogatories contained in the queſtion. And, firſt, the queſtion imports a doubt, whether two or more acts, do in point of law, make one and the ſame aſſurance: the capacity of the agent to do one act does not conclude to his capacity to do the other; and conſequently, whether the capacity of Lord *Ely* to levy the fine, does not conclude his capacity to acknowledge the warrant of attorney [illegible]t my anſwer is, that there is only one inſtance in whic[illegible] capacity of an agent to do one act, concludes to h[illegible]pacity to do another, where the two make one aſſu[illegible]ce; and that is the caſe of a fine and deed leading the uſes; but in every other caſe but that, I anſwer in the negative; and I prove the truth of my anſwer thus. If a man had levied a fine twenty years ago, with intent to make a tenant to the *præcipe* in a recovery then intended to be ſuffered, and the recovery is not ſuffered for twenty years after, the fine and recovery are in point of law, one and the ſame aſſurance, as much as if they were both of the ſame term; and yet no man in his ſenſes will ſay that a fine levied twenty years

ago, is concluſive evidence of the ſanity of the conuſor twenty years after. But then the queſtion aſks, where two acts are done at one and the ſame time, and one of thoſe acts is in itſelf concluſive evidence of the capacity of the agent to do that act, ſhall it not be concluſive evidence of his capacity to do the other. But my anſwer to that queſtion is alſo in the negative; becauſe if it were otherwiſe, then the act which is in itſelf concluſive evidence of the agent's capacity to do that act, would be concluſive evidence of his capacity to do any other act whatſoever, whether it made a part of the ſame aſſurance or not. And ſo if an idiot levied a fine, and the hiſtory of the law proves, that idiots have been received to levy fines, and at the ſame time made his will, that fine would be concluſive evidence of his capacity to make ſuch a will, which no man in his ſenſes will maintain. But the queſtion enquires farther, whether, where two acts, the one of which is concluſive in itſelf, and the other not, make but one aſſurance and are done at one and the ſame time, theſe two circumſtances put together, do not make one act concluſive evidence of the capacity of the agent to do the other. But I anſwer, not, becauſe I believe no two acts can be ſuppoſed more intimately connected with each other, both in unity of time, and of aſſurance, than a will of a real and a perſonal eſtate, written upon one and the ſame piece of paper or parchment, and ſubſcribed by one and the ſame ſignature; and yet it is clear law, that though the probate of ſuch a will is concluſive evidence of the ſanity of the teſtator to make ſuch will, yet it is by no means concluſive evidence of his capacity

capacity to diſpoſe of his real eſtate. And why? evidently becauſe the capacity of the party to do the two acts is triable by different juriſdictions. And the ſame reaſon applies to the caſe of the fine and the warrant of attorney: for as the capacity of the teſtator in the firſt caſe is triable by the Judge of the Spiritual Court, as to the perſonal eſtate, and his capacity as to his real eſtate by a jury, ſo in the latter caſe the capacity of the conuſor to levy the fine, is triable by the fine itſelf, and his capacity to acknowledge the warrant, is triable by a jury. From all which I am warranted to lay it down as a general poſition, that the capacity of a party to do one act, is not concluſive to his capacity to do another, if his capacity as to that other be triable by a different juriſdiction, whether the two acts make one and the ſame aſſurance, or are done at one and the ſame time or not.

It will then perhaps be aſked what? and has the fine no operation? is it not even evidence? I anſwer that it has all the operation it was ever intended to have, it has made a good tenant to the *præcipe*, and has put the evidence of it on record: and if the plaintiff in error had aſſigned for error, that there was not a good tenant to the *præcipe*, he would have been concluded by the fine: and further, if the fine had been pleaded to the writ of error, as a fine with proclamations, upon which five years after the title accrued had run, without any claim, and that the plaintiff in error could not reply, that he had claimed within the five years, or that he came within the ſavings of the ſtatute, he would in like manner have been

barred by the fine. But as the caſe is at preſent circumſtanced, the fine proves nothing concluſively but its own exiſtence. I ſay it proves nothing concluſively but that: but, when I ſay ſo, I would not be underſtood to mean, that it is not evidence to go to a jury; for, on the contrary, I think it is evidence, and evidence of the moſt perſuaſive nature, but eſpecially when coupled with the inquiſition and warrant of attorney: for though I cannot ſubſcribe to the doctrine which the queſtion ſeems to inſinuate, that a legal concluſion admits of degrees of comparative ſtrength, or that it is more or leſs concluſive at different times; and though I can no more admit that three pieces of evidence, none of which is concluſive in itſelf, do altogether amount to a concluſion, any more than I can, that three cyphers make a unit, yet I feel very ſenſibly that perſuaſive evidence may be more or leſs ſtrong according to its nature, and that three pieces of evidence tending to eſtabliſh one and the ſame fact, are ſtronger evidence, than one of them would be ſingly. And therefore, upon the whole, my anſwer to the ſecond queſtion is, that the inquiſition, the fine, and the warrant of attorney, are not in any caſe which has been put ſingly, or altogether concluſive evidence, ſo as to warrant the judgment of the Court of King's Bench.

TITLE XXXVII.

ALIENATION BY CUSTOM.

CHAP. I.

Alienation of Copyholds by Surrender and Admittance.

CHAP. II.

How Intails of Copyholds may be barred, and Effect of Releaſes.

CHAP. I.

Alienation of Copyholds by Surrender and Admittance.

§ 1. *Alienation by Cuſtom.*
4. *Surrender.*
17. *Who may Surrender.*
25. *To whoſe Uſe a Surrender may be.*
29. *Preſentment.*
33. *Admittance.*
37. *The Admittance muſt be according to the Surrender.*
40. *Who may admit.*
41. *Effect of a Surrender and Admittance.*
43. *The Admittance relates back to the Surrender.*
47. *Surrender by way of Mortgage.*
55. *A Surrender will not deſtroy a Contingent Remainder.*
58. *Conſtruction of Surrenders.*
77. *A Surrender is ſometimes ſupplied in Equity.*

Section 1.

Alienation by Cuſtom. Tit. 10. c. 3. f. 50.

IT has been already ſhewn that copyholders being mere tenants at will, they cannot alien their eſtates by feoffment or other aſſurance at common law; but by the cuſtom of all manors in which this kind of property is to be found, every copyholder has a power of transferring his eſtate to any other perſon, by ſur-

rendering or yielding it up to the Lord of the Manor, in truſt that he may grant it out again to the perſon named in the ſurrender, which is therefore called an alienation by cuſtom.

§ 2. This practice is as ancient as the time of *Bracton*, who ſays of free copyholders—*dare enim non poſſunt tenementa ſua, nec ex cauſa donationis ad alios transferre, non magis quam villani puri, et unde ſi transferre debeant, reſtituant ea domino vel ballivo, et ipſi ea tradunt aliis, in villenagium tenenda.*

207 a.

§ 3. The proceſs in moſt manors is, that the tenant ſurrenders his eſtate to the lord, in truſt to be again granted by him to ſuch perſons, and for ſuch uſes, as are mentioned in the ſurrender. This ſurrender muſt be preſented by the jury or homage of the manor, and found by them upon their oaths, and then the lord grants the land to the perſon named in the ſurrender, to hold by the ancient rent and cuſtomary ſervices, and thereupon admits him tenant to the copyhold by the delivery of a rod, a glove, or the like, in the name of corporal ſeiſin of the lands and tenements.

This mode of alienation therefore conſiſts of three parts, the ſurrender, the preſentment, and the admittance.

Surrender.

§ 4. A ſurrender is a yielding up of the eſtate by the tenant to the lord, for the purpoſe of being regranted to ſome other perſon. The form of it is thus

Tit. f. 74.

—*ad hanc curiam venit* A. *et ſurſum reddidit in eadem curia*

curia unum meſſuagium, &c. *in manus domini, ad uſum B. et hæredum ſuorum.*

§ 5. Lord *Coke* ſays, that the word ſurrender is *vocabulum artis*, and therefore where a ſurrender is neceſſary, if this word be wanting all other words uſed in ordinary conveyances are inſufficient to convey a copyhold eſtate; for as a copyholder is tied to a particular mode of conveyance, ſo he is reſtrained to a particular form of words. Cop. f. 39.

§ 6. A ſurrender muſt transfer the lands to the lord, otherwiſe it cannot have any effect, becauſe the perſon to whoſe uſe the ſurrender is made muſt come in under the eſtate of the lord, and by a grant from him.

§ 7. Every copyholder may ſurrender his eſtate in court, without alledging any particular cuſtom for it. So a copyholder may ſurrender to the lord himſelf, out of court, without a ſpecial cuſtom. 1 Inſt. 59 *a*.

§ 8. A ſurrender out of court to the ſteward of the manor is alſo good, by the general cuſtom of all manors, though the ſteward be only appointed by parol. 4 Rep. 30 *b*.

§ 9. A ſurrender out of court by the hands of two or three tenants of the manor, or by the hands of the bailiff or Reeve, or of any other perſon, muſt be warranted by a ſpecial cuſtom, and particularly pleaded. 1 Inſt. 59 *a*.

Parker v. Kett, 1 Ld. Ray. 658.

§ 10. A ſurrender of a copyhold to the deputy of a deputy ſteward, out of court, is good, becauſe he is a ſteward *de facto* at the time.

Co. Cop. ſ. 34. Combe's Caſe, 9 Rep. 75.

§ 11. A copyholder may ſurrender in court by attorney, without a ſpecial cuſtom to warrant it; for he may ſurrender by the general cuſtom of *England*, which is the common law, and then it is incident to do it by attorney.

9 Rep. 76 *a.*

§ 12. A copyholder cannot, however, ſurrender into the hands of two tenants by attorney, for ſuch ſurrender, though in perſon, is not warranted without a ſpecial cuſtom.

9 Rep. 76 *b.*

§ 13. An attorney who makes a ſurrender ought to purſue the uſual form, as by the rod, *&c.* according to the cuſtom of the manor; and he ought to make it in the name of his principal, not in his own name; or ſhew his authority, and ſay he ſurrenders it by force of ſuch authority.

§ 14. A purchaſer of a copyhold is, however, not obliged to accept of a ſurrender by letter of attorney.

Mitchel v. Neale, 2 Veſ. 679.

§ 15. Upon a bill for ſpecific performance of an agreement for ſale of copyhold lands, the defendant inſiſted upon making the ſurrender by attorney, and not otherwiſe, and that he was ready to do ſo. The plaintiff inſiſted on his doing it in perſon, and entered into proof that the cuſtom of the manor was, that whoever wanted to ſurrender muſt, unleſs in ſpecial

caſes

caſes of diſability, do it in perſon. By a decree at the Rolls a trial was directed as to this cuſtom. On an appeal to Lord *Hardwicke* the decree was affirmed, becauſe no court of juſtice will compel a purchaſer to accept of a doubtful title.

§ 16. Lord *Hardwicke* held there was no neceſſity of a declaration of the uſes of a ſurrender in the court roll; and that where the ſteward indorſed the uſes on the back of the ſurrender, it was ſufficient. 1 Atk. 74.

§ 17. All perſons who are capable of conveying their eſtates by any common law aſſurance, are alſo enabled to ſurrender their copyhold eſtates. Who may ſurrender. Co. Cop. ſ. 34.

§ 18. By the general cuſtom, a huſband and wife may ſurrender the wife's copyhold, provided the wife is privately examined by the ſteward. And where there is a ſpecial cuſtom to warrant it, a ſurrender by the huſband and wife made out of court upon an examination of the wife, before two tenants of the manor is good. Gilb. Ten. 277. 312. Eriſh v. Rives, Cro. Eliz. 717.

§ 19. But a cuſtom for a married woman to ſurrender her copyhold lands, without the aſſent of her huſband, is void: becauſe it is contrary to the general law and policy of the nation; and would tend to render wives independent of their huſbands.

§ 20. *Frances* the wife of *William Geary* being entitled to a copyhold eſtate, which had deſcended to her from her father, was admitted, and being privately examined, Stephens v. Tyrrell, 2 Wilſ. Rep. 1.

examined, ſurrendered the eſtate to the uſe of herſelf for life, with remainder over. After ſeveral arguments the court was clearly of opinion that this was a bad cuſtom.

Compton v. Collinſon, 1 H. Black. R. 334.

§ 21. But where a married woman lived ſeparate from her huſband, under articles of ſeparation, by which he covenanted that ſhe ſhould enjoy to her own uſe all ſuch eſtates both real and perſonal as ſhould come to her during the coverture, and that he would join in the neceſſary conveyances to limit them to ſuch uſes as ſhe ſhould appoint. Afterwards copyhold lands having deſcended to the wife, the huſband again covenanted in the ſame manner as before that he would join in ſurrendering ſuch eſtates to ſuch uſes as his wife ſhould appoint. It was held by the court of Common Pleas that a ſurrender by the wife alone was good, although there was no ſpecial cuſtom to authorize it.

Goodtitle v. Moyſe, 3 Term Rep. 365.

§ 22. A mere poſſibility cannot be ſurrendered; and therefore it was reſolved in a late caſe, that a ſurrender by the heir apparent of a copyholder, in the lifetime of his anceſtor, had no effect whatever; and did not even operate as an eſtoppel, though the heir ſurvived his anceſtor.

§ 23. Nothing can be ſurrendered but a legal eſtate; it is not however neceſſary that ſuch legal eſtate ſhould be in poſſeſſion, it is ſufficient if it be veſted; and therefore an eſtate in remainder or reverſion may be ſurrendered.

§ 24. It

§ 24. It follows from this principle that an equitable intereſt in a copyhold may be transferred from one perſon to another, without a ſurrender, for otherwiſe it would be unalienable.

To whoſe Uſe a Surrender may be.

§ 25. A copyhold eſtate may be ſurrendered to the uſe of any perſon capable of taking an eſtate by a common law conveyance; and alſo to ſome perſons not capable of taking by ſuch aſſurances.

Co. Cop. f. 35. 4 Rep. 29 *b.* Tit. 38. c. 3.

§ 26. Thus a copyhold may be ſurrendered to an infant *in ventre matris*; and a huſband may ſurrender a copyhold to the uſe of his wife, of which the reaſon will be given hereafter. A perſon may alſo ſurrender a copyhold to the uſe of his laſt will.

Co. Cop. f. 35.

§ 27. In grants at common law, if the grantee be not in *rerum natura*, and capable of taking at the time when the grant is made, it is merely void. But in the caſe of ſurrenders, the law is otherwiſe, for though at the time of the ſurrender the grantee is not *in eſſe*, or not capable of a ſurrender, yet if he be *in eſſe* and capable at the time of the admittance, that is ſufficient; and, therefore, a ſurrender to the uſe of him who ſhall be heir to *J. S.*, or to the uſe of *J. S.*'s next child, or to the uſe of *J. S.*'s wife, though at the time of the ſurrender *J. S.* had no heir, child, or wife, yet if afterwards he hath a child, or taketh a wife, his heir, his child, or his wife, may come into court, and compel the lord to admit according to the ſurrender.

Idem.

Lord *Coke* ſays, the reaſon of the law is this, a ſurrender is a thing executory, which is executed by the ſubſequent

ſubſequent admittance, and nothing at all is inveſted in the grantee before the lord hath admitted him according to the ſurrender; and, therefore, if at the time of the admittance the grantee be in *rerum natura*, and able to take, that will ſerve.

263. § 28. Lord Chief Baron *Gilbert*, in his *Treatiſe of Tenures*, obſerves, that this doctrine ſeems to be reaſonable, and to carry no inconvenience with it, for it is not like a grant at common law; for there, if there be nobody to take, the grant is void, becauſe the eſtate muſt be ſomewhere, and the grant puts it out of the grantor. But in caſe of a ſurrender, there is no inconvenience at all, for the ſurrenderee hath nothing till admittance, but the eſtate is in the ſurrenderor. But then it ſeems, that if the ſurrenderee be not *in eſſe* before the admittance, that the ſurrender will be void, for this ſeems to be implied by Lord *Coke*; for he ſays, that if, at the time of the admittance, the grantee be in *rerum natura*, that will ſerve, which implies that the admittance is to be made after the uſual manner, not that the admittance ſhall be put off till there be ſuch a perſon: for, if the perſon to whom the ſurrender was made ſhould never come *in eſſe*, then the admittance time would be eternally put off, the old ſurrender would ſtand good, and nobody be able to diſpoſe of the copyhold eſtate.

Preſentment. § 29. By the general cuſtom of copyholds, all ſurrenders made in court muſt be preſented by the homage or jury; and where ſurrenders are made out of court, they muſt be preſented at the next court which

is

is held after ſuch ſurrender is made; but, in ſome manors, more time is allowed for preſenting ſurrenders. 2 Veſ. 302.

§ 30. It ſeems that preſentment of a ſurrender in court is only by way of inſtruction, to give the lord notice of the ſurrender. But a preſentment is not of abſolute neceſſity; for if the lord does not require a preſentment to be made, and proceeds without it, any ſubſequent act of his which ſhews his aſſent to the ſurrender will be ſufficient. Gilb. Ten. 278.

§ 31. A ſurrender is good, though the ſurrenderor ſhould die before it is preſented; provided it be preſented within the time required by the cuſtom. And ſo it is if the perſons to whom the ſurrender is made die before preſentment. 1 Inſt. 62 *a*. 4 Rep. 29 *b*.

§ 32. Copyhold lands were ſurrendered to two tenants out of court, who died before preſentment; it was held that the ſurrender was good, and might be preſented at the next court, by any other copyholder of the manor. Forſel v. Welſh, Cro. Ja. 495.

§ 33. When a ſurrender is duly preſented in court by the homage or jury, the lord, by his ſteward, grants the copyhold ſo preſented to the perſon to whoſe uſe it was ſurrendered; and, thereupon, admits him tenant to the copyhold, and the admittance is entered on the court-rolls of the manor. Admittance.

The

The entry of the admittance in the court-rolls is thus; *et ſuper hoc venit prædictus B. et cepit de domino in eadem curia meſſuagium prædictum, &c. habendum, &c. et dat domino pro fine, &c. et fecit domino fidelitatem, et admiſſum eſt.*

Lit. ſ. 74.

Gilb. Ten. 282.

§ 34. The acceptance of the new tenant by the lord, conſtitutes the eſſence of an admiſſion, all the reſt is mere form; and, therefore, any act of the lord ſhewing his conſent to the ſurrender, amounts to an implied admittance; but ſtill the admiſſion muſt be regularly entered on the court-rolls.

§ 35. But the mere acceptance of a ſurrender by the ſteward, and the entry thereof in the court-rolls, with the delivery of a copy of ſuch entry to the ſurrenderee, will not amount to an admittance.

Rawlinſon v. Green, Poph. 127. Bridg. 81.

§ 36. A copyholder ſurrendered out of court, according to the cuſtom of the manor, and the ſurrender was preſented at the next court, and an entry thereof made by the ſteward thus, *compertum eſt per homagium, &c.* but there was no admittance. It was determined, that this entry on the rolls did not amount to an admittance. 1ſt, Becauſe the acceptance of the preſentment by the ſteward from the homage was no more than what he was bound to do, as being judge of the court. 2d, Becauſe the entry of it on the roll was but an office of duty, being but evidence to the court, as alſo to him to whoſe uſe the ſurrender was made; and ſo was the delivery of the copy to the ſurrenderee. But none of theſe things did imply the conſent

conſent of the lord, that the *ceſtui que* uſe ſhould be admitted to have the land according to the ſurrender; and all theſe things together did not imply an admittance, for all of them might be done though no admittance were in the caſe.

The Admittance muſt be according to the Surrender. Co. Cop. f. 41.

§ 37. As the lord has only a cuſtomary power to make admittances, according to the terms of the ſurrender, and is nothing more than a mere inſtrument, it follows, that if there be any variance between the admittance and the ſurrender, either in the perſon, the eſtate, or the tenure, or in any other point, the admittance is good, ſo far as the lord has executed his power; but where he exceeds it, he acts without authority, and, therefore, the exceſs is void.

Co. Cop f. 41. 4 Rep. 29.

§ 38. Thus, Lord *Coke* ſays—If *A.* ſurrenders to the uſe of *J. S.* for life, and the lord admits him in fee, an eſtate for life only paſſeth; ſo if I ſurrender without mentioning any certain eſtate, becauſe, by implication of law, an eſtate for life only paſſeth, though the lord doth admit in fee, no more doth paſs than the implication of law will warrant. If I ſurrender with the reſervation of a rent, and the lord admits, not reſerving any rent, or reſerving a leſs rent than I reſerved on the ſurrender, this admittance is wholly void. But if the lord reſerves a greater rent, then is the reſervation void only for the ſurpluſage, and the admittance ſo far current as it agreeth with my ſurrender. If I ſurrender upon condition, and the lord omits the condition, the admittance is wholly void; but if my ſurrender be abſolute, and the lord's admit-

tance be conditional, the condition is void, but the admittance, in all points elſe, is good.

2 Term. R. 484.

§ 39. A *mandamus* will be granted by the Court of King's Bench to compel the lord to admit a perſon to whom a copyhold has been ſurrendered.

Who may admit.
Tit. 10. c. 2. ſ. 4.

§ 40. We have ſeen, that in the caſe of voluntary grants of copyholds, every lord of a manor *pro tempore* may make ſuch grants, and admittances in conſequence thereof: but, in the caſe of admittances upon ſurrenders, this doctrine is carried ſtill farther, becauſe the lord is only deemed an inſtrument to admit the *ceſtui que* uſe, and no more paſſes to the lord than is neceſſary to ſerve the limitation of a uſe; ſo that no reſpect is had to the quantity or quality of his eſtate in the manor; for whether it be right or wrong, admittances made by him can never be called in queſtion, on account of any defect in his title, becauſe they are judicial acts which every lord is bound to do.

1 Inſt. 59 *b.* 4 Rep. 27 *b.* Co. Cop. ſ. 41.

Effect of a Surrender and Admittance.

§ 41. A ſurrender and admittance, when made purſuant to the cuſtom, operate as effectuallly in transferring a copyhold eſtate, as a feoffment or any other common law conveyance can operate in transferring an eſtate of freehold.

Co. Cop. ſ. 39.

§ 42. It is laid down by Lord *Coke*, that a ſurrender, where, by a ſubſequent admittance, the grant is to receive its perfection and confirmation, is rather a manifeſting of the grantor's intention, than of paſſing away any intereſt in the poſſeſſion; for, till admittance, the law

law taketh notice of the grantor as tenant, and he ſhall receive the profits of the land to his own uſe, and ſhall diſcharge all ſervices due to the lord, yet the intereſt is in him but *ſecundum quid*, and not abſolutely, for he cannot paſs away the land to any other, or make it ſubject to any other incumbrance than it was ſubject to at the time of the ſurrender; neither in the grantee is any manner of intereſt inveſted before admittance, for if he enter, he is a treſpaſſer, and puniſhable in treſpaſs; and if he ſurrender to the uſe of another, the ſurrender is merely void, and by no matter *ex poſt facto* can be confirmed. But though the grantee hath but a poſſibility upon the ſurrender, yet this is ſuch a poſſibility as is accompanied with a certainty; for the grantee cannot poſſibly be deluded or defrauded of the effect of his ſurrender, and the fruits of his grant; for if the lord refuſe to admit him, he is compellable to do it by a *ſubpœna* in the Chancery; and the grantor's hands are ever bound from the diſpoſing of the land any other way, and his mouth ever ſtopped from revoking or countermanding his ſurrender.

The Admittance relates back to the Surrender.

§ 43. This doctrine has been in ſome degree altered by determinations, in which it has been eſtabliſhed, that the ſurrender is the ſubſtantial part of the conveyance, and a complete execution of the contract, as between the vendor and vendee; that the admittance muſt be purſuant to the ſurrender, and, conſequently, muſt relate to it, ſo that the eſtate of the ſurrenderee is complete to many purpoſes before admittance.

1 Inſt. 59 *b.* Porter v. Porter, Cro. Ja. 100.

§ 44. Thus, Lord *Coke*, in his Comment on *Littleton*, ſays, if two joint-tenants be of copyhold lands in fee, and one out of court, according to the cuſtom, ſurrenders his part to the uſe of his laſt will, and deviſes it to a ſtranger in fee, and dies, and at the next court the ſurrender is preſented, by the ſurrender and preſentment, the jointure was ſevered; for, by relation, the ſtate of the land was bound by the ſurrender.

§ 45. This doctrine is fully confirmed by the following caſe.

Vaughan v. Atkins, 5 Burr. 2764.

Richard Kent being ſeiſed in fee of the premiſes in queſtion, held by copy of court-roll according to the cuſtom of the manor, but not expreſſed to be at the will of the lord, contracted to ſell the ſame for a valuable conſideration to *John Atkins*, and ſurrendered them out of court to the uſe of ſaid *John Atkins* and his heirs, who entered into poſſeſſion. *John Atkins* died without being admitted, and before the ſurrender was preſented, no court having been held until after his death. The cuſtom of the manor, with reſpect to the widow's eſtate, was, that if the huſband died ſeiſed, his widow had a right to be admitted to the land as her free-bench, during her widowhood. The queſtion was, whether, in this caſe, the widow of *John Atkins* was entitled to her free-bench?

It was argued for the heir at law of *John Atkins*, that the cuſtom under which the widow claimed, and which was free-bench, was conſidered by all authorities, particularly *Hobart* 181. as a part fruit or excreſcence out of the eſtate of the huſband; it was, in

fact, the eſtate of the huſband, which, for the benefit of the widow, was ſaid to have continuance after his death, for a period of time deſcribed by the particular cuſtoms of particular manors; in ſome, during the widow's life, in others, during her widowhood only. To have continuance, it muſt firſt exiſt; but it does not exiſt till the huſband is a complete copyholder; and he is not a complete copyholder, till, in the language of the cuſtoms, he is ſeiſed. For the true idea of ſeiſin, reſort muſt be had to the ancient ſyſtem of feudal tenures; by that ſyſtem, ſeiſin was a technical expreſſion to deſcribe the completion of the inveſtiture by which the tenant was admitted into the tenure, and, without which, no freehold could be conſtituted or paſs; *ſciendum eſt, feudum ſine inveſtitura nullo modo conſtitui poſſe.* Without this ſeiſin, nothing more than a naked poſſeſſion was acquired. In the conveyance of freeholds, where it was by feoffment, the inveſtiture was completed by livery. In the conveyance of copyholds, after ſurrender, it was completed by admittance; and no caſe was to be found, where admittance was not deemed as neceſſary to complete the inveſtiture, in the conveyance of a copyhold, as livery was of a freehold, where it paſſed by feoffment; or as inrollment, where it was conveyed by bargain and ſale. Upon theſe principles, therefore, that no eſtate of this ſort could paſs unleſs the inveſtiture was completed, and that the inveſtiture could not be completed without admittance, it was inſiſted, that *John Atkins* did not die ſeiſed, and, therefore, that his widow was not within the cuſtom; that ſhe had no right to be admitted under it, and, for that reaſon, could have no right to retain the premiſes againſt the heir.

On the other ſide, it was contended for the widow, that if the death of *ceſtui que* uſe before admittance does not alter the nature of the eſtate, transferred by the ſurrender, the widow muſt have the ſame title as if the huſband had been admitted; and if the admittance has a relation to the time of the ſurrender, in all reſpects, and even ſo far as to defeat all meſne acts between the ſurrender and admittance, it will follow, that the admittance of the heir muſt have relation back to the time of the ſurrender, ſo as to give the *ceſtui que* uſe a complete title, and to give his eſtate all the incidents which would have accompanied it, if they had happened at the ſame moment; and, conſequently, that the widow, who would have been entitled if they had in fact ſo happened, ſhould have a right to the fiction of law, eſpecially againſt the heir.

Lord *Mansfield* ſaid, the queſtion was, whether the heir of the ſurrenderee, who dies before admittance, ſhall avoid the free-bench or cuſtomary dower of the widow, becauſe he died before admittance. In this caſe, the contract was for a purchaſe and ſale. The ſurrender is the ſubſtantial part of the conveyance, and a complete execution of the contract as between the vendor and the vendee. The ſurrender and the admittance are different parts of the ſame conveyance. The formal effectuates the ſubſtantial part, and, therefore, muſt relate to it; both together make but one conveyance. The admittance muſt be purſuant to the ſurrender, and, conſequently, muſt operate as from the date of it.

Surrender

Surrender to *A.*—Before admittance ſurrenderee dies, *A.* is afterwards admitted. *A.* ſhall avoid the free-bench of the widow of the ſurrenderor; for *A.*'s admiſſion has relation to the ſurrender. Benſon v. Scot, 3 Lev. 385. 1 Salk. 185. Tit. 10. c. 3. ſ. 39.

If one joint-tenant ſurrenders to the uſe of his will, his deviſee ſhall take, for the admittance relates to the ſurrender, and from that time ſevers the joint-tenancy. 1 Inſt. 59 *b.* Ante ſ. 44.

It is laid down that the lord is only an inſtrument; that after admittance, the ſurrenderee is in by him who made the ſurrender. That although the ſurrenderor or the tenant by whoſe hands the ſurrender was made die, yet preſentment and admittance afterwards is good: and where he to whoſe uſe the ſurrender is made, before admittance, dies, his heir ſhall be admitted. The true reaſon is drawn from the context, and given in *Bacon's Abridgement.* "For, upon admittance, the eſtate is in *ceſtui que* uſe from the time "of the ſurrender by relation." 4 Rep. 49 *b.* Tit. Cop. (G. ſ. 8.)

Moore's caſe *Trin.* 40 *Eliz.* referred to by Juſtice *Newdigate* in the caſe of *Blunt* v. *Clarke*, is not ſtated, nor does it appear what the queſtion was. The propoſition in *Roll's Abridgement*, "that the heir being "admitted is in by the lord, and not by him that "made the ſurrender," is contrary to truth, and all the authorities. The lord is a mere inſtrument, and cannot vary from the ſurrender; and, in the ſame caſe of *Blunt* v. *Clarke*, reported afterwards in the ſame book, *Glynn* Chief Juſtice ſays, "if a man ſeiſed of "copyholds in borough *Engliſh* ſurrenders to the uſe 2 Sid. 38. Vol. 1. 627. pl. 9. 2 Sid. 61

" of *J. S.* and his heirs, and *J. S.* dies before admit-
" tance, leaving two ſons, the younger of them ſhall
" have the land, becauſe he is in by deſcent, or at
" leaſt by force of the firſt ſurrender, and ſo in nature
" of a deſcent." And it is ſaid in the *Treatiſe of Tenures* aſcribed to Lord Chief Baron *Gilbert*, and I
Pa. 288. ſuppoſe written by him, " That this opinion ſeems
" very reaſonable, for heirs was certainly there a word
" of limitation, and not of purchaſe; and, certainly,
" there is as much reaſon to adjudge the heir in by
" deſcent here, as there is to adjudge an heir in by
" deſcent, where a recovery was had againſt the an-
" ceſtor, but not executed till after his death, becauſe
" the uſe might have veſted during the life of the an-
" ceſtor, and becauſe the execution hath a retroſpect.
" And, in truth, the caſe of a ſurrender is juſt the
" ſame, for admittance might have been in the life of
" the anceſtor; and when it was had, it had a retro-
" ſpect." And, in the margin, he refers to *Shelley*'s caſe in 1 *Rep.* 106. where the opinion was, that the execution had a retroſpect to the recovery.

With this reaſoning we agree, and are of opinion, that, upon admittance, the heir is in by deſcent, from the ſurrender to which the admittance relates.

The leſſor of the plaintiff, in this caſe, is expreſsly admitted as heir; the law caſts the free-bench upon the widow, juſt as it caſts the deſcent upon the heir. The admittance, by relation, makes her huſband ſeiſed from the date of the ſurrender.

There

There is no rule better founded in law, reaſon, and convenience, than this, that all the ſeveral parts and ceremonies neceſſary to complete a conveyance ſhall be taken together as one act, and operate from the ſubſtantial part by relation. Livery relates to the feoffment; inrollment to the bargain and ſale; a recovery to the deed which leads the uſe; ſo admittance ſhall relate to the ſurrender, eſpecially when it is a ſale for a valuable conſideration, as in this caſe.

The title is not complete till admittance, and to the lord it is material, in reſpect of his fine; but as between the parties, the vendor and vendee, the admittance is mere form. The agreement is executed, and the land bound by the ſurrender, the lord is compelable by *mandamus*, or decree, to admit. The vendor, his widow, his heir, and all claiming under him, are concluded from ſaying after admittance, that the land did not paſs from the day of the ſurrender. Upon this ground the leſſor of the plaintiff claims the inheritance whereof his brother died ſeiſed; it ſhall not be in his mouth to ſay againſt the widow, that his brother did not die ſeiſed. Therefore let judgment be for the defendant the widow.

§ 46. The law laid down by Lord *Mansfield* in the preceding caſe has been fully confirmed by a late determination of the Court of King's Bench, in which it was held, that the title to copyhold lands relates back from the time of the admittance to the ſurrender, as againſt all perſons but the lord; ſo that the ſurrenderee may recover in ejectment againſt the ſurrenderor, on a demiſe

Holdfaſt v. Clapham, 1 Term. Rep. 600.

demiſe laid between the times of ſurrender and admittance.

Surrenders, by Way of Mortage. Wade's Caſe, 5 Rep. 114.

§ 47. Copyhold eſtates may not only be ſurrendered to the uſe of another perſon, abſolutely, but alſo upon condition that if the ſurrenderor pay the ſurrenderee a particular ſum of money on a given day, the ſurrender ſhall be void; and in all caſes of this kind the ſurrenderor continues to be the legal tenant till the mortgagee is admitted.

Doe v. Wroot, 5 Eaſt's Rep. 132.

§ 48. It is ſaid by Lord *Hardwicke* that mortgages of copyholds were conſtantly made in the following manner. A conditional ſurrender was made, and if that ſurrender was not preſented, the general cuſtom of the manor being that it became void, a new ſurrender was made, and the Lord did not become entitled to a fine on theſe ſurrenders, becauſe they were only intended as a pledge for ſecuring the payment of the money advanced.

Skin. 142.

Doe v. Morgan, 7 Term Rep. 103.

§ 49. If the perſon to whoſe uſe the ſurrender is made, is admitted, he acquires the legal eſtate, and therefore, upon payment of the money, he muſt ſurrender back the premiſes to the mortgagor.

Fawcett v. Lowther, 2 Veſ. 300.

§ 50. In the caſe of a mortgage of a copyhold, the equity of redemption will follow the cuſtom, as to the legal eſtate, as it does in borough *Engliſh* lands, which, if mortgaged, the equity of redemption will deſcend to the youngeſt ſon, to whom the lands will deſcend.

§ 51. Although

§ 51. Although a ſurrender by way of mortgage be not preſented, yet it will be a lien on the eſtate in equity, and will be good againſt the aſſignees of a bankrupt.

§ 52. One ſeiſed in fee of a copyhold, made a mortgage of it to *J. S.* but the ſurrender was not preſented at the next court, by means whereof it became void, and afterwards the mortgagor who had continued in poſſeſſion became a bankrupt. And though on a diſpute between the mortgagee and the creditors, it was objected that it was the mortgagor's own fault, that he did not procure the ſurrender to be preſented, and that this was probably with an ill intent, namely, to wrong the lord of his fine; that the copyholder being in poſſeſſion, and the viſible owner of the eſtate, this might, and in all likelihood did, induce his creditors to truſt him, as thinking his eſtate would be liable to their debts; that it was reaſonable all the creditors of the bankrupt ſhould come in equally, and the mortgagee only for his proportion, his mortgage being void at law, and conſequently liable to the bankruptcy, and that equality was the higheſt equity; yet it was decreed on great deliberation, that this mortgage, though void at law, was notwithſtanding an equitable lien upon the copyhold eſtate, and ſhould be made good in equity, and bind the aſſignees of the commiſſion of bankruptcy and all the creditors.

Taylor v. Wheeler, 2 Vern. 564. 1 P. Wms. 279. Tit. 15. ch. 5. ſ. 21.

§ 53. A mortgagee of a copyhold will not be allowed to tack a judgment debt to that due upon the mortgage;

Tit 14. f. 39. mortgage; becauſe copyhold lands are not ſubject to an execution upon a judgement.

Cannon v. Pack, 6 Vin. Ab. 242.

§ 54. Upon a bill by the heir of the mortgagor to redeem a mortgage of copyhold lands, upon payment of principal and intereſt due upon the mortgage, the defendant inſiſted to have a judgment which had been aſſigned to him firſt ſatisfied, before the plaintiff ſhould be let in to redeem. But Lord *Harcourt* ſaid that copyhold lands were not liable to a judgment, and therefore the judgment ſhould not be tacked to the mortgage in this caſe. But the plaintiff ſhould redeem upon payment of what was due upon the mortgage, without ſatisfying the judgment.

A Surrender will not deſtroy a Contingent Remainder. Fearne Con. Rem. 469.

§ 55. The ſurrender of a copyhold eſtate will not deſtroy a contingent remainder limited thereon, becauſe the legal freehold which is in the lord will ſupport it.

Mildmay v. Hungerford, 2 Vern. 243.

§ 56. Thus where copyhold eſtates were deviſed to *A.* for life, remainder to his firſt and other ſons in tail, *&c.* remainder to *B.* in fee. *A.* before he had any ſons born bought the reverſion of *B.* and had it ſurrendered to his (*A.*'s) own uſe, thinking by that means to merge his eſtate for life, and ſo deſtroy the contingent remainder to his firſt ſon. But however it was agreed that this ſurrender of the reverſion would not bar the ſon; becauſe the freehold and inheritance were in the lord; for there is not the like inconvenience, as in freehold eſtates in common law, in reſpect of contingent remainders, where there is nobody againſt whom to bring the *præcipe*.

§ 57. Lord

§ 57. Lord Ch. Baron *Gilbert* ſays, "Copyholder "for life, remainder to another in fee, the firſt copy- "holder commits a forfeiture, he in remainder ſhall "not enter, but the lord ſhall hold it during the life "of the firſt copyholder; for copyhold eſtates are "not like thoſe at common law, for in copyhold caſes "the remainder is to commence after the death of the "tenant for life, and not after his eſtate or intereſt is "gone." Ten. 244. 265. Vide Fearne Con. Rem. 471.

§ 58. The conſtruction of a ſurrender, or rather of the uſes which were declared in the ſurrender, was not formerly ſo ſtrict as that of a common law conveyance, eſpecially where there had been a cuſtom in the manor of conſtruing ſurrenders in a particular manner. Conſtruction of Surrenders.

§ 59. Thus, although the ſurrender be general, the ſurrenderee will only take an eſtate for life. But if there be a ſpecial cuſtom in a manor, that the words *ſibi et ſuis*, or, *ſibi et aſſignatis*, &c. ſhall create an inheritance, they will be allowed to have that effect. Co. Cop. f. 49. Bunting v. Lepingwell, 4 Rep. 29 *a*. Gilb. Ten. 258.

§ 60. A cuſtom that where a copyholder ſurrenders to the uſe of another, without expreſſing any eſtate, the lord may grant it in fee to the perſon, to whoſe uſe the ſurrender was made, was held to be good. For the intereſt of the land being between the lord and the copyholder, it was not unreaſonable that upon ſuch an uncertainty, the lord ſhould aſcertain it. Brown v. Foſter, Cro. Eliz. 392.

§ 61. Lord

Co. Cop. f. 49.

§ 61. Lord *Coke* ſays, if a copyhold be ſurrendered to a man, *et ſemini ſuo hereditabili de corpore*, or to a man, *et heribus ex ipſo procreatis*, or to a man in frank marriage with his wife, an eſtate tail will paſs, in the firſt, without the word *heirs*, in the ſecond without the word *body*, and in the third without either.

Seagood v. Hone, Cro. Car. 366.

§ 62. It was however reſolved in the reign of *Charles* I. that an eſtate tail ſhould not ariſe by implication, upon a ſurrender of a copyhold. As where a copyholder ſurrendered to *A.* and *B.* and the longer liver of them; and for want of iſſue of the body of *A.* the lands to remain to the ſon of *J. S.* It was reſolved that *A.* had but an eſtate for life, and being ſo by expreſs limitation, no greater eſtate ſhould ariſe to him by implication.

1 P. Wms. 14. Tit. 32. ch. 24. ſ. 48.

§ 63. In the caſe of *Fiſher* v. *Wigg*, Juſtice *Gould* ſaid, that ſurrenders of copyhold land to uſes ſhall have the ſame favourable conſtruction as wills, and are not to be tied up to the ſtrict rules of the common law, but expounded according to the intent of the party. This principle was oppoſed by Lord *Holt*, who held that ſurrenders of copyholds muſt be governed by the ſame rules as conveyances at common law.

1 P. Wms. 70. 2 Ld. Raym. 1144.

In the caſe of *Idle* v. *Cook* which aroſe a few years after, Lord *Holt* and the other Judges appear to have agreed in the opinion, that the conſtruction of a ſurrender ought to be the ſame as that of a feoffment or any other deed. And Juſtice *Powell* ſaid, "We have "gone too far already, in helping the intention of "the parties, in conſtruction of limitations, and have

"made

" made eſtates ſo uncertain, that lawyers do not know " how to adviſe purchaſers; I cannot conſent to carry " it any farther."

This doctrine has alſo been laid down by Lord *Hardwicke*, who has ſaid that ſurrenders of copyholds are to be conſtrued as deeds and conveyances at common law, and not as a will. Lovell v. Lovell, 3 Atk. 11.

§ 64. The conſtruction of ſurrenders is however ſo far ſimilar to that of wills, that the word *or*, will be conſtrued *and*, in order to effectuate the intention of the parties.

§ 65. A perſon ſurrendered a copyhold to the uſe of himſelf for life, and from and after his deceaſe, to the uſe of his wife during her widowhood, and after his deceaſe, and upon the marriage of his wife, then to the uſe and behoof of *William Wallis*, for his natural life, and from and after his deceaſe, to the uſe of the iſſue of his body lawfully to be begotten; with a proviſo that in caſe *William Wallis* ſhould die in the lifetime of the ſurrenderor, *or* without iſſue of his body, then all the ſurrendered premiſes ſhould go to the right heirs of the ſurrenderor for ever. *William Wallis* died in the lifetime of the ſurrenderor, leaving iſſue, who brought an ejectment; and the queſtion was, whether they were entitled to this copyhold. Wright v. Kemp, 3 Term Rep. 470.

Lord *Kenyon* ſaid the queſtions were, what was the intention of the parties to the ſurrender; whether they had expreſſed it in legal terms; and if ſo, whether any

any rule of law would be violated in giving effect to it? There was no doubt but that a ſurrender was conſidered as a common law conveyance, and was not entitled to the ſame favourable conſtruction as a will. And therefore unleſs the ſurrenderor had uſed the language which would confer a legal eſtate, it could not be conferred. In deeds certain legal phraſes muſt be uſed, in order to create certain eſtates; as the word *heirs*, to create a fee, and *heirs of the body*, to create an eſtate tail. But beyond that he would ſay with Lord *Hardwicke*, that there was no magic in particular words, further than as they ſhew the intention of the parties. Now here it was impoſſible to entertain any doubt. *S. Burrill* ſurrendered the eſtate to the uſe of himſelf for life, then to his wife during her widowhood, then, that is in caſe her eſtate for life was put an end to by doing this act, which he meant to guard againſt, to her ſon *W. Wallis* for life, and after his deceaſe, to the iſſue of his body. Therefore he could not accede to what was ſaid by the defendant's counſel, that this was a contingent remainder in *W. Wallis*; for it was veſted, though he cautiouſly avoided ſaying what the limitation to his iſſue was. The ſurrender then proceeded to ſtate a proviſo, that in caſe *W. Wallis* ſhould die in the lifetime of the ſurrenderor, *or* without iſſue of his body, the eſtate ſhould go to the right heirs of the ſurrenderor: and here the queſtion aroſe on the word *or*. Now there was no doubt on the intention of the parties, and where ſenſe required it, there were many caſes to ſhew that the court might conſtrue the word *or* into *and*, and, *and* into *or*. 2 *Stra.* 1175. 3 *Atk. Rep.* 590. in order

order to effectuate the intent of the parties. Here therefore in order to give effect to the intention of the ſurrenderor the court muſt ſay, that when he uſed the word *or*, he meant *and*. And there was no caſe in which any difference had been made, as to this point between a will and a deed, when the court were conſidering how the intention of the parties could be effected. Then without deciding what intereſt the leſſors of the plaintiff had, at all events they had a ſufficient title to maintain this ejectment.

§ 66. The rule eſtabliſhed in *Shelly*'s caſe takes place in the conſtruction of ſurrenders, and therefore where a perſon ſurrenders to the uſe of himſelf for life, remainder to another in tail, remainder to his own right heirs, there the heirs ſhall take by deſcent.

Vide Tit. 32. ch. 25. Gilb. Ten. 270. Fearne Con. Rem. 79. Allen v. Palmer, 1 Leon. 101.

§ 67. Mr. *Fearne* obſerves, that in a caſe noticed by *Atkyns* upon a ſurrender of a copyhold to the uſe of the huſband for life, then of the wife for life, and of the heirs of the bodies of the huſband and wife, remainder in fee to the uſe of the ſurvivor, it is ſaid the limitation did not veſt an abſolute eſtate tail in the wife who ſurvived, but only gave her an eſtate tail after poſſibility of iſſue extinct, and that the eſtate tail veſted in the perſon who was heir of the bodies of both huſband and wife. That the reaſons for this opinion are not mentioned, nor was it ſtated to be the reſolution of the court, nor did it appear whether that point entered the queſtion then before the court.

Cont. Rem. 80. Sutton v. Stone, 2 Atk. 101.

And

And that it is no eaſy matter to account for ſuch an opinion.

The limitation to the heirs of the bodies of the baron and feme muſt either have been executed in the baron and feme jointly, as an eſtate tail in poſſeſſion, or have veſted in them jointly, as a remainder; unleſs it would have been held a contingent limitation to the heir of both their bodies; in neither of the two firſt caſes could the wife be tenant in tail after poſſibility of iſſue extinct, ſo long as any iſſue of her body by her deceaſed huſband was living, and if there was any ſuch iſſue then living, it could not veſt in ſuch iſſue till her death. In the third caſe ſhe could take no eſtate tail at all, and conſequently could not be tenant in tail after poſſibility of iſſue extinct. The only caſes in which ſhe could be tenant in tail after poſſibility of iſſue extinct, were, thoſe two in which it was impoſſible there ſhould then be any ſuch perſon as the heir of both their bodies. The queſtion being upon a ſurrender of a copyhold made no difference in the conſtruction; as it was agreed in the ſame caſe that ſurrenders of copyholds ſhould be conſtrued in the ſame manner as conveyances at common law. Now under a ſimilar limitation at common law, he apprehended, the huſband and wife, taking diſtinct and ſucceſſive eſtates for life, the joint limitation to the heirs of their bodies would not have been executed in them in poſſeſſion, but would have been veſted in them jointly, as a remainder in tail; that this remainder ſurviving to the wife, upon the deceaſe of her huſband, would have merged her eſtate for life, ſo

Tit. 32. c. 25. f. 15.

as to make her tenant in tail in poſſeſſion; but ſhe having had no iſſue by her deceaſed huſband, or ſuch iſſue being then extinct, would thereby have become only tenant in tail after poſſibility of iſſue extinct.

§ 68. *Charles Aiſtrop* the father, being ſeiſed in fee of a freehold eſtate, and alſo of the premiſes in queſtion, being copyhold of inheritance deſcendible to the youngeſt ſon, ſettled his freehold previous to his marriage to the uſe of himſelf and *Ann* his intended wife for their lives and the life of the ſurvivor, and after their deceaſe to the uſe of the heirs of the body of the ſaid *Charles* on the body of the ſaid *Ann* to be begotten, with remainder to his own right heirs. And alſo covenanted to ſurrender his copyhold, "To the uſe "of himſelf and his ſaid intended wife and the heirs "of their two bodies to be begotten in like manner, "and to the ſame uſes as the freehold lands and "tenements therein before mentioned were ſettled "and conveyed." The copyhold was ſurrendered to the uſe of the huſband and wife for their lives and the life of the ſurvivor, and after their ſeveral deceaſes to the uſe of the heirs of their two bodies lawfully begotten or to be begotten, and for want of ſuch iſſue to the huſband, his heirs and aſſigns for ever. The huſband and wife were admitted accordingly, and died leaving iſſue two ſons.

Roe v. Aiſtrop, 2 Black. Rep. 1228.

The queſtion was to which of the ſons the copyhold went. Lord Ch. Juſt. *De Grey* ſaid it was a mighty clear caſe. There was reaſon indeed to ſuppoſe that the parties might not mean the two eſtates to go in a

different channel; but this was only a ſuppoſition, and if certain, ſtill as this was a legal eſtate, it was not in the power of the parties to alter the legal courſe of deſcent. It was an eſtate executed, and ſeemed to be an eſtate tail in the father and mother. Had it been executory and upon articles, then according to Lord *Hardwicke*'s doctrine in the caſe of *Roberts* v. *Kingley*, the court might have conſidered the word *heir* as a word of purchaſe, but in the preſent caſe it was impoſſible. Sir *William Blackſtone* ſaid he thought the freehold was clearly veſted in the father only, in ſpecial tail, the copyhold in both father and mother. So far there was a difference made in the outſet, notwithſtanding the words in like manner, *&c.* he conceived there appeared no intention in favour of either ſon excluſively, they were left to the diſpoſition of the law. The heir was intended to ſucceed, but who that heir ſhould be, muſt be left to the legal courſe of deſcent; in the freehold it was the eldeſt ſon, in the copyhold the youngeſt, and had there been only two daughters, both would have ſucceeded in both. In like manner only meant that both eſtates ſhould be intailed.

Tit. 32. c. 25. ſ. 41.

Judgement for the youngeſt ſon.

§ 69. Mr, *Fearne* has obſerved on this caſe, that it related to an actual legal ſettlement before marriage, in reſpect to the freeholds; and, therefore, the limitation of thoſe lands was not open to the conſtruction of articles, to be carried into ſtrict ſettlement. And the ſettlement of the copyhold, though reſting in the covenant

Cont. Rem. 84.

covenant for ſurrender, ſeemed intimately blended with that of the freehold, as part of one and the ſame ſettlement; beſides, that the limitations of the ſurrender agreed upon, were expreſsly referred to the ſame manner and uſes, as the freeholds were ſettled, and therefore could not, conſiſtently, with the expreſs terms of ſuch a ſtipulation, be limited in ſtrict ſettlement on the iſſue as purchaſers, when the ſettlement of the freeholds gave an eſtate-tail to the parent. And there was no other conſtruction by which the deſcent of the lands to the youngeſt ſon could be avoided. This took it out of the authority of the caſes where marriage-articles were carried into execution by way of ſtrict ſettlement, and accounted for the diſtinction by the Chief Juſtice, between this caſe, as of an eſtate executed, and one executory on articles.

Tit. 32. c. 25. f. 35.

§ 70. Where an eſtate for life is limited either to the father or mother only, and the ſubſequent limitation is to the heirs of both their bodies, the conſtruction is the ſame in regard to copyholds as to freeholds, namely, the ſubſequent limitation does not veſt in the anceſtor taking the eſtate for life, but is a contingent remainder to the heirs of the bodies of both father and mother.

Fearne Cont. Rem. 85.

Tit. 32. ch. 25. f. 15.

§ 71. A perſon ſurrendered copyhold lands, to the uſe of *D.* and of the wife of *A.* for their lives, and afterwards to the uſe of the heirs of the bodies of *A.* and his wife; upon a queſtion in ejectment, whether this ſubſequent limitation to the heirs of the body of

Lane v. Pannel, 1 Roll. Rep. 238.

A. and his wife, veſted an eſtate-tail in the wife of *A.*, it was held that it did not, but was a contingent remainder to the heirs of both their bodies.

Frogmorton v Wharrey, 2 Black. R. 728.

§ 72. *John Robinſon* ſurrendered a copyhold eſtate *ad opus et uſum Mariæ Arnall* (quam in uxorem ducere intendit) et hæredibus eorum duorum corporum legitimè procreatis, et pro defectu talis exitus, ad opus et uſum rectorum hæredum prædicti *Johannis Robinſon*. *Mary Arnall* was admitted, *tenendum ſibi et hæredibus eorum duorum corporum legitimè procreatis;* remainder to the right heirs of *John Robinſon*. The Court of Common Pleas was of opinion, that the wife took only an eſtate for life, with a contingent remainder to the heirs of the bodies of the huſband and wife.

1 Leon. 111.

§ 73. In the caſe of *Allen* v. *Palmer*, Lord *Coke* held, that where a perſon ſurrendered a copyhold to the uſe of himſelf for life, remainder to another in tail, remainder to the right heirs of the ſurrenderor, there his heirs ſhall be in by deſcent; contrary where the ſurrenderor hath not an eſtate for life or in tail limited to him, for there his heir ſhall enter as a purchaſer, as if ſuch uſe had been limited to the right heirs of a ſtranger, which is contrary to the rule in freeholds; for, in that caſe, where the eſtate moves from the grantor, the ultimate limitation to his heirs general, though the anceſtor takes no preceding freehold, will be a reverſion in him, and part of the old eſtate, and the heir will take it by deſcent.

Tit. 11. ch. 4. ſ. 26.

§ 74. Mr.

§ 74. Mr. *Fearne* has obſerved, that the only ground upon which he could account for Lord *Coke*'s opinion, was, the ſuppoſition that an entire new eſtate was created and derived under the uſes of the ſurrender, throughout the whole of them, and that no eſtate taken under thoſe uſes is any part of the old eſtate; but this notion has been entirely exploded by modern deciſions. Cont. Rem. 87. Gilb. Ten. 272.

§ 75. *Blackwell North* ſurrendered a copyhold to the uſe of himſelf and his heirs till the ſolemnization of his marriage, then to the uſe of himſelf for life, remainder to his wife for life, remainder to truſtees to preſerve contingent remainders, remainder to the children of the marriage in ſuch manner as *B. N.* ſhould appoint; in default of appointment, to the heirs of the body of *B. N.* by his intended wife, and in default of ſuch iſſue, to the ſaid *B. N.* his heirs and aſſigns for ever. Lord *Manſfield* held, that though *B. N.* had limited the reverſion in fee to himſelf, yet the words did not operate, for the uſe reſulted by operation of law. And all the Judges agreed, that after the ſurrender to the uſes of the ſettlement, the reverſion ſtill continued in the huſband; and that no alteration or change of eſtate happened in this caſe. Roe v. Griffith, 4 Burr. 1952. Vide Thruſtout v. Cunningham, Tit. 38. c. 4.

§ 76. It appears ſomewhat doubtful, whether limitations in the nature of ſpringing and ſhifting uſes are good in ſurrenders of copyholds. It may be obſerved, that if limitations of this kind are not good, great inconveniencies muſt ariſe, as the uſual practice for a Vide Fearne Cont. Rem. 416.

long time paſt has been, to inſert a covenant in marriage ſettlements, to ſurrender copyholds to the ſame uſes to which the freehold eſtates are limited; and, in moſt of ſuch ſettlements, there are ſpringing and ſhifting uſes.

A Surrender is ſometimes ſupplied in Equity. Anon. 2 Freem. 65.

§ 77. It has been long ſettled, that a court of equity will ſupply the want of a ſurrender of a copyhold eſtate, in favour of a purchaſer for a valuable conſideration, againſt the party who ought to make the ſurrender, and alſo againſt his heir.

Barker v. Hill, 2 Cha. Rep. 218.

§ 78. *A.* contracted with *B.* for the purchaſe of a copyhold eſtate, and paid the purchaſe money, and *B.* agreed to ſurrender the premiſes at the next court, but died before a court was held, or any ſurrender made. Upon a bill in Chancery by the purchaſer againſt the heir, the court decreed, that he ſhould ſurrender the premiſes as ſoon as he came of age.

Vide Taylor v. Wheeler, ante.

Jennings v. Moore, 2 Vern. 609. Blenkarne v. Jennens, 2 Bro. Parl. Ca. 278. Patteſon v. Thompſon, Finch 272.

§ 79. *A.* lent *B.* 200 *l.* on a ſurrender of ſome copyhold lands, which *A.* neglected to get preſented at the next court, by which it became void. *B.* afterwards ſold the ſame lands to *J. S.* who took a ſurrender, which he preſented, and was admitted. But it appearing that he had notice of *A.*'s right, the Lord Chancellor decreed, that *A.*'s defective ſurrender ſhould be made good. And on an appeal to the Houſe of Lords, the decree was affirmed.

Vane v. Fletcher, 1 P. Wms. 352.

§ 80. In the caſe of a voluntary conveyance, a court of equity will not ſupply the defect of a ſurrender againſt

againſt the heir, unleſs he has done ſomething to prevent the acceptance of the ſurrender.

Courts of equity will alſo ſupply the defect of a ſurrender to the uſe of a will in many caſes; of which, an account will be given in the next title.

TITLE XXXVII.

ALIENATION BY CUSTOM.

CHAP. II.

How Intails of Copyholds may be barred, and the Effect of Releaſes.

§ 2. *Forfeiture and Regrant.*
7. *Recovery in the Manor Court.*
12. *How ſuch Recoveries may be reverſed.*
18. *Surrender.*
24. *A Cuſtom to bar by Surrender or Recovery, is good.*
26. *A Grant of the Freehold deſtroys an Intail.*
30. *How conditional Fees are barred.*
32. *Effect of Releaſes.*

Section 1.

Tit. 10. ch. 3. ſ. 54.

WE have ſeen, that copyhold eſtates may be intailed where there is a ſpecial cuſtom to warrant it, or rather, that they may be limited to a perſon and the heirs of his body, with a remainder over; and that the ſtatute *de donis conditionalibus* co-operating with the cuſtom, will give to ſuch an eſtate all the qualities of an eſtate tail. In conſequence of which, it has been determined, that intails of copyholds may be barred in ſeveral ways, for otherwiſe eſtates of this kind would be unalienable, which the law will not allow.

Forfeiture and Regrant.

§ 2. The modes of barring intails of copyholds are principally three. Firſt by forfeiture and regrant: as, where a tenant in tail of a copyhold commits a forfeiture,

ture, in conſequence of which the lord of the manor ſeiſes it, and grants it either to the old tenant, or to another perſon; ſuch grantee will acquire an eſtate in fee-ſimple.

§ 3. Upon a trial at bar in ejectment for lands held of the manor of *Wakefield*, it was admitted, that by the cuſtom of that manor, copyhold lands might be intailed, and that the mode of barring ſuch intails was, for the tenant in tail to commit a forfeiture, and then the lord made three proclamations, after which he ſeiſed the copyhold, and granted it to the copyholder in fee; and another cuſtom to bar ſuch intail was, for the tenant in tail to made a ſurrender to a purchaſer in fee, and then for the purchaſer, intending to bar the intail and the remainders, to commit a forfeiture, then the lord to ſeiſe and make three proclamations, *&c.* that thereby the iſſue in tail was barred, though the tenant in tail did not join. And this cuſtom was found by the jury, and allowed by the court to be good. Pilkington v. Stanhope, Sid. 314.

§ 4. This caſe is alſo reported by *Style*, who mentions, that Lord Chief Juſtice *Roll* ſaid, he conceived there could be no cuſtom for this, becauſe the ſeizure for a forfeiture deſtroyed the copyhold eſtate; for it was at the lord's election after the ſeizure, whether he would grant the eſtate again by copy of court roll or not; but this doctrine was confirmed in a ſubſequent caſe. Sty. R. 452. Gilb. Ten. 177. 299.

§ 5. On

Grantham v. Copley, 2 Saund. Rep. 422 *b.*

§ 5. On a trial at bar, it was ruled by the court on evidence, that where *William Saville* was tenant in tail of divers copyholds in the manor of *Wakefield*, and made a voluntary leaſe for 21 years, without licence of the lord, to commit a forfeiture, which was preſented in the copyhold court, and the lands ſeiſed into the hands of the lord, according to the cuſtom of the manor, and *Saville* appointed the forfeiture to be for the benefit of *Arthur Saville* and his heirs. And it being proved that there was a cuſtom to commit ſuch forfeitures, on purpoſe to bar the intails of copyhold, and to transfer the lands over to any other perſon, although *Arthur Savill* was not admitted by the lord in the lifetime of *William Savill*, yet he had a good title; and the forfeiture was only in the nature of a ſurrender, or of a common recovery, and the lord could not admit any other than him to whom it was limited, by the tenant ſo making ſuch forfeiture; but *ceſtui que* uſe after his admittance ſhall have it, and the lord cannot otherwiſe diſpoſe of it; and wherever *ceſtui que* uſe is admitted, he ſhall avoid all meſne acts or diſpoſitions made by the lord, as he ſhould if a ſurrender had been made to his uſe, and he had afterwards been admitted according to the ſurrender.

2 Vef. 604. 2 Saund. R. 422 *b.* n 1.

§ 6. This cuſtom of barring the intails of copyholds by forfeiture and regrant, is ſaid to be peculiar to the manor of *Wakefield*. But Mr. Serjeant *Williams* obſerves, "it ſhould ſeem, that if there was a cuſtom in "any other manor, of barring an intail of a copyhold "by forfeiture and regrant, it would be good; for "what

" what is a good cuſtom in one manor, muſt neceſſa-
" rily be ſo in another."

§ 7. The ſecond mode of barring copyhold intails, is by a ſpecies of common recovery, grounded on what *Littleton* ſays, ſ. 76. that plaints, in the nature of writs of aſſize at common law, will lie in the lords court. Recovery in the Manor Court.

§ 8. Thus, in 23 and 24 *Eliz.* it was adjudged by the Court of Common Pleas, that where, by the cuſtom of the manor, plaints have been made in the court of the manor, in nature of real actions, that if a recovery be in a plaint, in nature of a real action againſt the tenant in tail, (admitting that copyhold land may be intailed), that it ſhould be a diſcontinuance, and ſhould toll the entry of the heir in tail. For, inaſmuch as plaints in nature of real actions were warranted by the cuſtom, it was an incident which the law annexed to the cuſtom, that ſuch a recovery ſhould make a diſcontinuance. Brown's Caſe, 4 Rep. 23 *a*. Moo. 358.

§ 9. This determination only ſays, that a recovery in the lord's court ſhall operate as a diſcontinuance, and take away the entry of the heir. And Lord Chief Baron *Gilbert* ſays, that a recovery with voucher does not, of common right, bar the intail of a copyhold, but that, as to the intailing them, cuſtom is requiſite; ſo, without cuſtom, the intail cannot be cut off. The reaſons are, that becauſe without an intended recompence in value, no recovery ſhall bind, and the ſurrenderee comes in, in the *poſt*, by the lord, and is not in, in the *per*, by the party, and ſo no warranty Ten. 175.

can be annexed to the copyholder's eſtate. Beſides, they have only an eſtate at will, to which no warranty can be annexed of common right; for no eſtate leſs than a freehold is capable by common right of having a warranty annexed to it. And, accordingly, it was adjudged in *Clun's* caſe, and all the judges held, that the recovery did not bind without a cuſtom. But there is a *quære*, whether judgment was given for the plaintiff upon the principal matter or no; for it ſeems to have been a diſcontinuance, and then the defendant's entry could not be lawful. There are two other caſes where this queſtion came in diſpute, but was not reſolved. It is held in the caſe of *Church* v. *Wiat*, that a recovery by cuſtom may bar, which implies that without a cuſtom, it cannot bar. But in the caſe of *Oldcot* v. *Level*, it was agreed, that a recovery may be in the court of the lord, that will bar a copyhold; and there it is ſaid generally, and is not put upon any cuſtom.

T. Raym. 162.

Cro. Eliz 380.

Moo. 753.

§ 10. The uſual mode of ſuffering a common recovery in a copyhold court, is thus: the tenant in tail ſurrenders it to ſome other perſon to make him tenant to the *præcipe*, and then a plaint in the nature of a writ of entry in the *poſt*, is brought againſt him, who vouches the tenant in tail, and he vouches the common vouchee.

Pigot 103.

§ 11. It was reſolved by the Court of Common Pleas in 27 *Cha.* 2. that where a tenant for life of a copyhold ſuffers a recovery as tenant in fee, it is no forfeiture of his eſtate; for the freehold not being concerned, and

Keen v. Kirby, 1 Mod. 199. 2 Mod. 32.

and it being in a court baron, where there is no eſtoppel, and the lord who was to take advantage of it, if it were a forfeiture, being a party, it was not to be reſembled to the forfeiture of a free tenant; and that cuſtomary eſtates had not ſuch accidental qualities as eſtates at common law, unleſs by ſpecial cuſtom.

§ 12. A recovery upon a plaint, in the nature of a real action againſt a tenant in tail, is a diſcontinuance, and takes away the entry of the heir in tail. 4 Rep. 23 a.

§ 13. Where a recovery is ſuffered of lands held in ancient demeſne, the proper mode of reverſing it is by writ of deceit. How ſuch Recoveries may be reverſed.

§ 14. Thus, where a writ of deceit was brought to reverſe a common recovery ſuffered of lands which were held of the manor of *Havering atte Bower* in the county of *Eſſex*, which is ancient demeſne, and of which the king is lord. Rex v. Firebrace, Barnes 258.

The defendants confeſſed the action; and the attorney-general remitted damages, and prayed judgment.

A rule was made for judgment, *niſi cauſa*, which was made abſolute on affidavit of ſervice, no cauſe being ſhewn.

§ 15. A common recovery, ſuffered in a copyhold court, can only be reverſed by petition to the lord, in the nature of a writ of falſe judgment. But it ſeems, that

that the lord of a manor is not in all caſes bound to allow of any proceedings on ſuch a petition.

Smith v. Dean and Chapter of St. Paul's, Show. Ca. in Parl. 67. 1 Vern. 367.

§ 16. Thus, where a bill was brought, to compel the Dean and Chapter of St. *Paul*'s, as lords of the manor, to receive a petition in the nature of a writ of falſe judgment for reverſing a common recovery ſuffered in the manor court above 30 years before, whereby a remainder in tail, which the plaintiff claimed, was barred; ſuggeſting ſeveral errors in the proceedings, and that the ſaid lords might be commanded to examine the ſame, and do right thereupon. To this bill the defendant *Rugle* demurred; and the Dean and Chapter by anſwer inſiſted, that it was the firſt attempt of the kind, and therefore of dangerous conſequence, and therefore conceived it not fit to proceed on the ſaid petition, unleſs compelled thereto by courſe of law. That *Rugle*, being the perſon concerned in intereſt to conteſt the ſufficiency of the common recovery, they hoped the court would hear his defence, and determine therein before any judgment were given againſt them; and that they were only lords of the manor to obey, *&c.* and prayed that their rights might be preſerved.

This demurrer was allowed by the Maſter of the Rolls, and alſo by the Lord Chancellor.

Upon an appeal to the Houſe of Lords, it was contended on the part of the appellant, that this was the only remedy which he had; for, as no writ of error or falſe judgment lay for reverſing a recovery or judgment

ment obtained in a copyhold court, the only method was a bill or petition to the lord in the nature of a writ of falſe judgment, which of common right he ought to receive, and to cauſe errors and defects in ſuch recovery or falſe judgment to be examined. And for this were cited *Moore* 68. *Owen* 63. *Fitz. N. B.* 12. 1 *Inſt.* 60. 4 *Rep.* 30. in which ſuch a record is mentioned to have been ſeen by *Fenner*; where the lord, upon petition to him had, for certain errors in the proceedings, reverſed ſuch judgment given in his court; 1 *Roll. Ab.* 539. 600. *Kitchen* 80. By all which, it appeared that this was an allowed, and the only remedy.

That in all caſes where any party, having a right to a freehold eſtate, was barred by a judgment, recovery, or fine, ſuch party of common right might have a writ of error, if the ſame were a court of record, and a writ of falſe judgment, if in a court baron or county court. And there could be no reaſon why a copyholder ſhould be without remedy, when a falſe judgment is given; and the rather, for that in real actions, as this was, the proceedings in the lord's courts were according to thoſe in *Weſtminſter Hall.* That, though a common recovery was a common aſſurance, yet it was never pretended that a writ of error to reverſe it was refuſed on that pretence; and, if the lord of a manor refuſed to do his duty, the Court of Chancery has a juriſdiction to compel him thereto. That, though common recoveries were favoured, and had been ſupported by ſeveral acts of parliament, yet no parliament ever thought fit to deprive the parties, bound

bound by ſuch recoveries, of the benefit of a writ of error.

On the other ſide, it was argued for the reſpondent, that the perſon who ſuffered this recovery had a power over the eſtate, that ſhe might both by law and conſcience, upon a recovery, diſpoſe of it as ſhe ſhould think fit: that ſhe had ſuffered a recovery according to the cuſtom of the manor, though not according to the form of thoſe ſuffered in *Weſtminſter Hall:* that the ſuffering of recoveries in any court, and the method of proceeding in them, are rather notional than real things; and in the common law courts they were taken notice of, not as adverſary ſuits, but as common aſſurances; ſo that, even there, few miſtakes were deemed ſo great but what were remedied by the ſtatute of *Jeofails*, or would be amended by the aſſiſtance of the court. And, if it were ſo in the courts at *Weſtminſter*, where the proceedings are more ſolemn, and the judges are perſons of learning and ſagacity, how much rather ought this to ſtand, which was ſuffered in 1652 during the times of diſorder, and moſt proceedings informal, and in the *Engliſh* tongue, in ſuch a mean court, where there were few precedents to guide them, where the parties themſelves were not empowered to draw up their own proceedings as here above, but the whole was left to the ſteward, who was a ſtranger to the perſon concerned, and, therefore, it was hard and unreaſonable, that men's purchaſes ſhould be prejudiced by the ignorance, unſkilfulneſs, or diſhoneſty of a ſteward or his clerks. That there was ſcarce one cuſtomary recovery in *England* which was

exactly agreeable to the rules of common law; that the queſtioning of this might, in conſequence, endanger multitudes of titles which had been honeſtly purchaſed, eſpecially ſince there could be no aid from the ſtatutes of *Jeofails*, for they did not extend to courts baron; that there was no precedent to force lords of manors to do as this bill deſired; that the lords of manors were the ultimate judges of the regularity or errors in ſuch proceedings; that there was no equity in the prayer of this plaintiff, that, if the lord had received ſuch petition, and were about to proceed to the reverſal of ſuch recovery, equity ought then to interpoſe and quiet the poſſeſſion under thoſe recoveries: that Chancery ought rather to ſupply a defect in a common conveyance, and decree the execution of what each party meant and intended by it, than aſſiſt the annulling of a ſolemn agreement executed according to uſage, though not ſtrictly conformable to the rules of law. The appeal was diſmiſſed, and the decree affirmed.

§ 17. If lands are cuſtomary freeholds, and paſs by ſurrender in a borough court, it is ſaid, that a recovery of ſuch lands ſuffered in the Court of Common Pleas, may be good.

Oliver v. Taylor, 1 Atk. 474.

§ 18. Lord *Coke* ſays, if by cuſtom copyholds may be intailed, the ſame, by like cuſtom, by ſurrender may be cut off; and ſo it hath been adjudged. And, in the caſe of *Lee* v. *Brown*, it was ſaid, that to maintain ſuch a cuſtom, it ought to be ſhewn that a formedon had been brought upon ſuch a ſurrender, and

Surrender. 1 Inſt. 60 *b*.

Poph. Rep. 128.

judgment given that it did not lie; yet it was agreed to be a ſtrong proof of the cuſtom, that they, to whoſe uſe ſuch ſurrenders had been made, had enjoyed the land againſt the iſſues in tail.

Hill v. Upchurch, Co. Sup. f. 12.

§ 19. In a caſe concerning lands held of the manor of *Northall* in *Eſſex*, it was agreed, that where copyhold lands may be intailed, a cuſtom, that a ſurrender ſhall be a bar or diſcontinuance of ſuch eſtate, is good.

§ 20. It appears to have been ſettled in ſome modern caſes, that a ſurrender by a tenant in tail of a copyhold, will bar his iſſue without a ſpecial cuſtom, unleſs a ſpecial cuſtom be found that a recovery is neceſſary.

White v. Thornburg, Prec. in Chan. 425. Gilb. Rep. 107. 2 Vern. 705.

§ 21. *A.* being a copyholder, covenanted by marriage articles, to ſurrender to truſtees, to the uſe of himſelf for life, remainder to his wife for life, remainder to the heirs-male of his body, remainder to his own right heirs. *A.* died without having made any ſurrender, leaving *B.* his ſon, and *M.* his daughter. *B.* ſurrendered his copyhold for payment of his debts.

Lord *Harcourt* was of opinion, that the copyhold being intailed by the articles, could not afterwards, by a bare ſurrender, be defeated, without a particular cuſtom had been found to have warranted it. But this decree was reverſed by Lord *Cowper*, who ſaid that, *prima facie*, it muſt be taken, that a ſurrender by ſuch tenant in tail will bind his iſſue, unleſs a particular

ticular cuſtom were found that there ought to have been a common recovery.

§ 22. In the caſe of *Carr* v. *Singer*, three judges, againſt Lord Chief Juſtice *Willes*, held, that where copyholds are intailable, and the cuſtom has not preſcribed any mode of barring the intail, it may be done by ſurrender. But the Lord Chief Juſtice thought that, in ſuch a caſe, a recovery was the proper mode. 2 Veſ. 603. Vide Martin v. Mowlin, 2 Burr. 979.

§ 23. A ſurrender to the uſe of a will, not only effectuates the will, but alſo operates as a bar to an eſtate tail; of which, an account will be given in Title 38. Deviſe.

§ 24. A cuſtom of barring eſtates tail in copyholds by ſurrender, may ſubſiſt concurrently with a cuſtom to bar by a recovery in the lord's court. A Cuſtom to bar by Surrender, or by Recovery, is good.

§ 25. In ejectment for a copyhold eſtate, a caſe was made for the opinion of the court, wherein it was ſtated, that within the manor of *Collingham*, where the lands lay, there were two cuſtoms of barring eſtates tail, which had been uſed within the ſame manor time out of mind; one was by common recovery, the other, by a ſurrender in fee to a purchaſer. That *Edward Smalley*, on the marriage of his ſon *Robert*, ſurrendered the premiſes to his ſon and *Suſannah* his wife, and their heirs, in general tail. They had iſſue *Edward Smalley* their ſon and heir, who, after their deaths, became tenant in tail, and ſurrendered the premiſes according to the cuſtom of the manor to *John Mills* and his heirs Everall v. Smalley, 1 Wilſ. R. 26. 2 Stra. R. 1197.

in fee; who dying, left *Robert Mills* his heir, and plaintiffs leſſor. The defendant was *Henry Smalley*, ſon and heir of *Edward Smalley*, who ſurrendered the premiſes to *John Mills* as aforeſaid. And whether the defendant *Henry Smalley*, the heir in tail, was barred by the ſurrender in fee, where there is alſo a cuſtom within the ſame manor of barring by recovery, was the queſtion.

After two arguments, it was unanimouſly reſolved by the court, that the heir in tail was barred.

Lord Chief Juſtice *Lee*.—" It has been ſaid at the " Bar, that a cuſtom in a manor to bar a tail by ſur- " render, ought only to be allowed *ex neceſſitate*, *i. e.* " when in the ſame manor there is no uſage to bar by " a recovery: there is, indeed, great diverſity in the " books as to barring copyhold intails; but in none " of them can I find any caſe to warrant the diſtinc- " tion. The latter opinion of judges is, that in manor " courts, where a real action can be brought, a re- " covery in ſuch court will be a good bar. I own, " I can ſee no reaſon why the cuſtom to bar by ſur- " render ſhould not be good; but it is objected to " barring intailed copyholds by recovery; for recom- " pence in value does not extend to copyholds, the " iſſue in tail of copyholds not being barred in reſpect " of the recovery in value; but, to prevent the in- " convenience of perpetuities, theſe two cuſtoms may " well ſtand together, and are but two different ways " of barring the intail; and I think the ſurrender the " beſt."

Chapple, Juſt. to the ſame effect; "And the "cuſtoms muſt be taken to be both coeval, we cannot ſay which is prior; they ſeem equally convenient to prevent perpetuities."

Wright, Juſt.—"It ſeems to be agreed by the "counſel on both ſides, that an intail of a copyhold "may be barred by a recovery, or by a ſurrender in "fee within a manor, where there is no cuſtom for "barring by recovery; but it is inſiſted on one ſide, "theſe two cuſtoms cannot ſtand together. It has "been a controverted queſtion, ſince I attended this "bar, whether copyholds could be intailed: it is now "at this day ſaid they may, by cuſtom co-operating with the ſtatute *de donis*; but this is quite new "to me. The ſtatute *de donis* created no new eſtate. "Copyholders are no more than tenants at will, and "it is by the will of the lord and his mere conſent "only, that they are permitted to limit their copyholds in this or that way, either by ſurrender, or as "the cuſtom happens to be. And ſurely the lord, "who of his mere will permits a limitation to *J. S.* "and the heirs of his body, may permit *J. S.* to "alien the ſame by ſurrender: nobody ever thought "that copyholds were within the ſtatute *de donis*; "barring intails in copyholds have been much talked "of; but I think there is no ſuch thing. It is only "a way invented and permitted by the lord, to "get rid of the intail: the true reaſon of the iſſue in "tail being barred is the recovery over in value; "now, there can be no ſuch thing in the caſe of a

" copyhold: I think the ſurrender is a better way, if " the lord permits it, becauſe cheaper."

N. B. *Wright*, Juſtice, declared, that there was no poſſibility of underſtanding this matter by the books, and ſaid he had laboured much to underſtand them, and could not.

Denniſon, Juſt.—" Nothing more clear than that " tenant in tail of a copyhold may bar his iſſue by " ſurrender: and, where there may be a real action, " there may be a recovery. *Co. Lit.* 60 *b.* Theſe " are only two different conveyances; and it might as " well be ſaid that, at common law, where there is a " fine, that will bar the iſſue as well as the recovery, " therefore one of them muſt be void. A ſurrender, " I think, is a more natural way of conveying copy- " holds than a recovery, and I cannot ſee any uſe " a recovery is of, but only to create greater ex- " pence."

Doe v. Truby, 2 Black. R. 944. S. P.

A grant of the Freehold deſtroys an Intail.

§ 26. A grant of the freehold of a copyhold eſtate to a perſon having an eſtate tail in ſuch copyhold, will operate ſo as to extinguiſh the eſtate tail.

Dunn v. Green, 3 P. Wms. 9.

§ 27. A copyholder in tail accepted a grant from the lord of the manor of the freehold and fee ſimple to him and his heirs, and died indebted by bond wherein the heirs were bound; and, on a bill brought by the bond creditor for ſatisfaction out of the aſſets left by the obligor, the queſtion was, whether the premiſes

premiſes were aſſets by deſcent, and liable to the bond?

The Lord Chancellor, after time taken to conſider of it, thus delivered his opinion.—"Unleſs it be expreſsly found that the cuſtom of the manor allows of intails, then this is a fee conditional, and plainly merged by the grant of the freehold in fee: but, ſuppoſing the cuſtom of the manor *does* warrant intails, yet the copyhold is extinguiſhed, becauſe in the eye of the law that is but an eſtate at will, and muſt be merged by the grant of the freehold. The premiſes by ſuch grant are ſevered from the manor, conſequently the cuſtom of the manor cannot corroborate the legal eſtate at will. The copyholder cannot hold of himſelf; and the copyhold, though intailed, is ſwallowed up in the greater eſtate of the freehold: and as the tenant after ſuch time as he took the grant, did not himſelf continue a copyholder, ſo his ſon, on the deſcent of the freehold, is likewiſe no copyholder, which may be ſaid from ſon to ſon *ad infinitum*. Moreover, if the intail of the copyhold be not extinguiſhed, it will be a perpetuity; ſince the only proper way of barring the intail of a copyhold is, by recovery in the lord's court; but, after ſuch ſeverance as in the preſent caſe, no recovery can be ſuffered in the lord's court."

§ 28. At the end of this caſe there is a note in which it is ſaid, if *A.* be copyholder in tail remainder to *B.* in fee, and *A.* takes a grant of the freehold from the

3 P. Wms. 11. Note E.

the lord, to him and his heirs, and dies without iſſue, is not *B.* in whom there was once a veſted remainder in fee of the copyhold premiſes, intitled to the ſame? In anſwer to this Mr. *Cox* ſays; "With reſpect to the "quere made in the note above, it ſeems that the "remainder man could have no equity againſt the "tenant in tail (who had power to bar the remainder "one way or other,) upon the principle of *Cann* v. "*Cann.*" 1 *Vern.* 480.

§ 29. This doctrine has been confirmed in the following modern caſe.

Challoner v. Murhall, 2 Veſ. Jun. 524.

William Murhall ſurrendered a copyhold to the uſe of himſelf and his wife for their lives and the life of the ſurvivor, remainder to the uſe of *William* their eldeſt ſon in tail, remainder to *John* their ſecond ſon in tail, with ſeveral remainders over. *William Murhall* the eldeſt ſon died without iſſue. The Duke of *Bridgewater* who was ſeiſed in fee of the manor granted the ſaid premiſes to the ſaid *William Murhall* the elder, his heirs and aſſigns for ever, freed and enfranchiſed from all ſervices. *William Murhall* died without diſpoſing of the ſaid premiſes, or the freehold thereof, by which means they deſcended to *John Murhall*, who by his will charged the ſame with the payment of his debts and legacies, and deviſed it to *Thomas Murhall.* In this manor no recoveries were ſuffered, but eſtates tail were barred by ſurrender. The bill was filed by legatees; the Maſter reported that the premiſes were charged by the will; to which report exceptions were taken.

The

The Lord Chancellor ſaid it was impoſſible that any equity could keep alive this intail. *Thomas Murhall* (the next remainder man in tail,) never could have had a bill againſt his father and elder brother. No one could have a right againſt the tenant in tail. The caſe from Lord *Jeffries* proved a plain propoſition, that where the intereſt of the lord of the manor was united with the copyhold in tail, there muſt be a merger, for the method of barring it could not exiſt. 1 Vern. 392. 458.

§ 30. It has been ſtated that where the cuſtom of a manor does not admit of an intail of a copyhold, a ſurrender to the uſe of a perſon and the heirs of his body, gives him a conditional fee; in which caſe a ſurrender after iſſue had will bar the eſtate. How conditional Fees are barred. Tit. 2. ch. 1. ſ. 5.

§ 31. A ſurrender of copyhold lands was made within the manor of *Stevenſon* to the uſe of *J. S.* and the heirs of his body: and after iſſue had he ſurrendered the lands to a ſtranger. It was agreed by all the Juſtices that this was a conditional fee at the common law; and that after iſſue, he might alien the lands. Stanton v. Barney, Co. Sup. ſ. 12.

§ 32. Although in general a copyhold eſtate can only be aliened by ſurrender and admittance, yet Lord *Coke* ſays, that where a man hath but a right to a copyhold, he may releaſe it by deed, or by copy, to one that is admitted tenant *de facto*. Effect of Releaſes. 1 Inſt. 59 *b.* Gilb. Ten. 300.

§ 33. A copy-

Kite and Dymmock's Case, 4 Rep. 25 a.

§ 33. A copyholder surrendered his copyhold lands out of court to the use of another and his heirs, upon certain conditions. At the next court the surrender was presented, but in the presentment the conditions were omitted: and he to whose use the surrender was made being dead, the lord, by the steward, according to the custom, admitted his daughter and heir, who entered. The person who made the surrender, by his deed released to the daughter being in possession, and afterwards entered upon her; and if his entry was lawful or not was the question. It was adjudged that his entry was not lawful. The great doubt was, if by the said release by deed, the customary right of the copyholder was extinct, and he who made the surrender barred of his right; and it was objected that *Littleton* says, that a copyholder cannot alien his land by deed, but if he will alien, he ought to surrender; and that such tenants are called tenants by copy, because they have no other evidence concerning their tenements but the copies of the court rolls, and it was said that, that excludes all releases by deed, for then they would have other evidences than the court rolls. Also it was said that he who purchases the land, may, upon searching the rolls, be advised if the title of the land be good; but if a release by deed should extinguish rights, then it would be very dangerous to purchasers, for that doth not appear in the rolls. To which it was answered and resolved that the release in the case at bar extinguished the right of the copyholder. And their reason was, because he to whom the release was made was admitted to the tenements and copyhold in possession; so that a release of the

cuſtomary right may enure to him, and therefore the lord is not at any prejudice, for he has had his fine upon admittance, and he to whom the releaſe was made was in by title, namely, by the lord's admittance, and ſo the releaſe enures by way of extinguiſhment. Hull v. Sharbrook, Cro. Jac. 36. S. P.

§ 34. It was ſaid in the ſame caſe that if a copyholder be ouſted by one, by tort, there his releaſe by deed to the diſſeiſor or other wrongdoer, doth not transfer his right, nor bar him, for two reaſons. 1ſt, Becauſe he has no cuſtomary eſtate upon which the releaſe of the cuſtomary right can enure. 2d, It would be to the lord's prejudice, for thereby he would loſe his fine and ſervices; and for theſe reaſons the releaſe by deed in ſuch caſe is utterly void; and this is not againſt any thing *Littleton* ſaith, for *Littleton* ſpeaks of an alienation by ſurrender, and that of neceſſity ought to be into the lord's hands, according to the cuſtom: but the releaſe in the caſe at bar could not be made to the lord, but to the copyhold tenant in poſſeſſion. 4 Rep. 25 *b.* f. 74.

§ 35. Lord *Coke* ſays, if a perſon is ouſted of his copyhold, and the lord admits the perſon who has ouſted the copyholder, according to the cuſtom, a releaſe by the perſon ouſted, will extinguiſh his right. But if a copyholder makes a leaſe for years of his copyhold, he cannot by his releaſe paſs the reverſion, becauſe ſuch a releaſe enures by way of enlargement, to transfer an intereſt, and not by way of extinguiſhment, to drown a right. But the proper way would be Co. Cop. f. 56. Tit. 32. ch. 2. f. 22.

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